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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SEA-LAND SERVICE, INC.,
Petitioner,

v.

ELIZABETH HANFORD DOLE,
SECRETARY OF TRANSPORTATION, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the Maritime Subsidy Board's interpretation of Section 605(c) of the Merchant Marine Act, 1936 as being inapplicable to a provision of an operating-differential subsidy contract which would authorize nonsubsidized operations by contract vessels entitled to judicial deference?

2. Taking into account the purposes and policy of the Merchant Marine Act, 1936 and Section 605(c) thereof, should Section 605(c) be interpreted to be applicable to a provision of an operating-differential subsidy contract which would authorize the initiation of nonsubsidized operations by contract vessels, where those operations would be on an essential trade route already served by other U.S.-flag operators?

REFERENCE TO PARTIES BELOW

The following were the parties to the proceeding below:

Sea-Land Service, Inc., which is wholly owned by Sea-Land Corporation, which is in turn wholly owned at present by R. J. Reynolds Industries, Inc.[1] Affiliates of Sea-Land Service, Inc. are Sea-Land Industries U.S.A., Inc., Sea-Land Industries (Bermuda), Intersea Operations Ltd., Sea Readiness, Inc., and Tacoma Terminals, Inc.;

Elizabeth Hanford Dole, Secretary of Transportation;

Harold E. Shear, Maritime Administrator and Chairman, Maritime Subsidy Board;

Garrett Brown, Jr., Member, Maritime Subsidy Board;

Warren G. Leback, Member, Maritime Subsidy Board;

Maritime Subsidy Board; and

Waterman Steamship Corporation.

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[1] However, on April 25, 1984 the Board of Directors of R. J. Reynolds Industries, Inc. approved a plan to divest Sea-Land Corporation by distributing all of its outstanding Common Stock on a pro rata basis to holders of Reynolds Common Stock. The distribution is to occur on June 19, 1984.

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OPINIONS BELOW

The opinion delivered upon the rendering of the judgment sought to be reviewed is that of the United States Court of Appeals for the District of Columbia Circuit in *Sea-Land Service, Inc. v. Dole,* No. 82-1712, decided December 23, 1983. That opinion is reported at 723 F.2d 975, and it is reprinted as Appendix A hereto.

That opinion affirmed the judgment of the U.S. District Court for the District of Columbia in *Sea-Land Service, Inc. v. Lewis,* Civil Action No. 79-1100, decided April 27, 1982. The opinion delivered upon the rendering of that judgment is reported at 21 Pike & Fischer Shipping Regulation Reports ("S.R.R.") 950, and it is reprinted as Appendix G hereto.

The opinions of the administrative agency below were reported as follows:

> Waterman Steamship Corp., Initial Decision, Maritime Subsidy Board Docket Nos. S-421, S-455, Jan. 17, 1977: 17 S.R.R. 25 (Appendix B hereto);
>
> Waterman Steamship Corp., Final Opinion and Order, Maritime Subsidy Board Docket Nos. S-421, S-455, Sept. 5, 1978: 18 S.R.R. 925 (Appendix C hereto);
>
> Waterman Steamship Corp., Order Denying Reconsideration, Maritime Subsidy Board Docket Nos. S-421, S-455, Nov. 16, 1978: 18 S.R.R. 1257 (Appendix D hereto);
>
> Waterman Steamship Corp., Order Denying Requests for Reopening, Maritime Subsidy Board Docket No. A-129, Jan. 19, 1979: 18 S.R.R. 1550 (Appendix E hereto);
>
> In the Matter of: Unsubsidized Operations by Waterman Steamship Corp. on Trade Routes 5-7-8-9, 6 and 11 Under Contract No. MA/MSB-450, Order of the Acting Under Secretary of Commerce, Feb. 15, 1979: unreported (Appendix F hereto).

JURISDICTION OF THE COURT

The judgment of the Court of Appeals was entered on December 23, 1983. Upon application of Sea-Land Service, Inc. filed on March 8, 1984, the Chief Justice on March 9, 1984 issued an Order (No. A-722) extending the time for filing a petition for writ of certiorari in this case to and including May 21, 1984.[2]

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[2] The basis of the Application was that Sea-Land Service, Inc. then had a petition pending before the Maritime Administration which, if granted, would moot this case. The Maritime Administration has not yet acted upon that petition, and so it has become necessary for Sea-Land Service, Inc. to initiate proceedings in this Court.

This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. § 1254(1), which authorizes review of judgments of courts of appeals by writ of certiorari.

STATUTE INVOLVED

Section 605(c) of the Merchant Marine Act, 1936, as amended, 46 U.S.C. § 1175(c), provides as follows:

> (c) Vessels to be operated in an essential service served by citizens of the United States.
>
> No contract shall be made under this subchapter with respect to a vessel to be operated in an essential service served by citizens of the United States which would be in addition to the existing service, or services, unless the Secretary of Commerce shall determine after proper hearing of all parties that the service already provided by vessels of United States registry is inadequate, and that in the accomplishment of the purposes and policy of this chapter additional vessels should be operated thereon; and no contract shall be made with respect to a vessel operated or to be operated in an essential service served by two or more citizens of the United States with vessels of United States registry, if the Secretary of Commerce shall determine the effect of such a contract would be to give undue advantage or be unduly prejudicial, as between citizens of the United States, in the operation of vessels in such essential service unless following public hearing, due notice of which shall be given to each operator serving such essential service, the Secretary of Commerce shall find that it is necessary to enter into such contract in order to provide adequate service by vessels of United States registry. The Secretary of Commerce in determining for the purposes of this section whether services are competitive, shall take into consideration the type, size, and speed of the vessels employed, whether passenger or cargo, or combination passenger and cargo, vessels, the ports or

> ranges between which they run, the character of cargo carried, and such other facts as he may deem proper.[3]

The complete text of Section 605 is reprinted as Appendix I hereto.

STATEMENT OF THE CASE

This case presents an important issue regarding the prerequisites for judicial deference to a statutory interpretation of an administrative agency. While the subject matter of this case is an interpretation of Section 605(c) of the Merchant Marine Act, 1936, 46 U.S.C. § 1175(c) (hereinafter "Section 605(c)") by the Maritime Subsidy Board (hereinafter "Board"), it has pervasive implications for all administrative agencies, as well as for the courts which are called upon to review the statutory interpretations they render. As will be explained in greater detail in this Statement *infra,* the interpretation at issue here was rendered by the Board without any accompanying analysis or explanation whatsoever. However, the Court of Appeals reviewed that statutory interpretation using a "sufficiently reasonable" standard of review, and the Court held that that interpretation was sufficiently reasonable to be allowed (Appendix A, at 7a).

This case arises in the context of the award by the Board of an operating-differential subsidy contract, Contract No. MA/MSB-450, to Waterman Steamship Corporation (hereinafter "Waterman") under Subchapter VI of the Merchant Marine Act, 1936, 46 U.S.C. Ch. 27 (hereinafter "Act"). Section 605(c) of the Act provides, in pertinent part, that no contract may be made under that Subchapter for the initiation of service on an essential trade route already served by other

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[3] The Maritime Act of 1981, Pub. L. No. 97-31, 95 Stat. 151, which became effective on August 6, 1981, transferred the Maritime Administration to the Department of Transportation, and all functions, powers, and duties of the Secretary of Commerce relating thereto to the Secretary of Transportation. However, that Act also provides that except for substitution of the Secretary of Transportation as a party in any action the subject of which has been transferred to him, the Act does not affect actions commenced prior to its effective date, and proceedings therein are to be had in the same manner and effect as if the Act had not been enacted. Section 9(c), (d), 95 Stat. 152-153.

U.S.-flag operators, unless the Board determines, after proper hearing of all parties, that:

1. the service already provided by U.S.-flag operators is inadequate, and

2. additional vessels should be operated thereon in accomplishment of the purposes and policy of the Act.

The agency proceedings relevant to the award of Contract No. MA/MSB-450 are next summarized, and the proceedings in the courts below are summarized after that. As will be seen, the particular interpretation of Section 605(c) which is at issue here was not rendered until quite late in the agency proceedings.

I. AGENCY PROCEEDINGS.

On August 17, 1973 Waterman filed an application which, as subsequently amended, sought operating-differential subsidy (hereinafter "ODS") for the following operations: required service (that is, subsidized service for which minimum and maximum numbers of sailings per year are specified in the contract) on Trade Route ("TR") 21; and privilege service (that is, subsidized service for which no minimum number of sailings is specified in the contract) on TR's 5-7-8-9, 6 and 11 (Appendix B, at 1b). TR 21 covers the trade between the U.S. Gulf ports and ports in Western Europe, while TR's 5-7-8-9, 6 and 11 cover, essentially, the trade between the U.S. Atlantic Coast ports and the Western European, Scandinavian and Baltic ports.[4] Hence the privilege service contemplated by this application involved calling at the U.S. Atlantic Coast ports to load or discharge cargo both before and after crossing the Atlantic on certain TR 21 voyages, all to be done with subsidy.

Subsequently, on June 16, 1975, Waterman filed a separate application for ODS to conduct certain required service on TR's 5-7-8-9, 6 and 11 (Appendix B, at 1b). The two applications were assigned, respectively, Docket Nos. S-421 and S-455 by the Board. Sea-Land, an unsubsidized U.S.-flag carrier serving

[4] Maps showing all of the trade routes involved, reproduced from the Department of Commerce publication, Essential United States Foreign Trade Routes, appear as Appendix K hereto; essential trade routes are designated pursuant to § 211(a) of the Act, 46 U.S.C. §1121(a).

all of the trade routes covered by the applications, filed protests and petitions for leave to intervene, as did two other carriers, and the matters were separately referred to the Office of Administrative Law Judges for hearing and an Initial Decision on the issues set forth in Section 605(c) of the Act *(id.* at 1b-2b). As was noted above, those issues include the adequacy of existing U.S.-flag service on the trade route(s) specified in the application, and whether the proposed new service would be in furtherance of the purposes and policy of the Act. Proceedings on the two matters were consolidated and hearings, in which Sea-Land participated, were held in late 1975 and early 1976 (*id.* at 2b).

In his Initial Decision issued on January 17, 1977, the Administrative Law Judge found, *inter alia,* that U.S.-flag service on the four trade routes involved was inadequate, that additional vessels should be operated thereon in the accomplishment of the purposes and policies of the Act, and hence that Section 605(c) was not a bar to the award of an ODS agreement to cover the involved operations (Appendix B at 60b).

Exceptions to the Initial Decision were filed with the Board by both Sea-Land and Waterman, and in its Final Opinion and Order issued on September 5, 1978, the Board affirmed the Initial Decision only insofar as it concerned TR 21. The Board found that the proposed service on TR's 5-7-8-9, 6 and 11 was barred by Section 605(c), because (1) contrary to the Initial Decision, U.S.-flag service on TR 5-7-8-9 was and would for the foreseeable future be adequate, and (2) while U.S.-flag service on TR's 6 and 11 was and would for the foreseeable future be inadequate, Waterman failed to show that its proposed operations on those routes would further the purposes and policy of the Act (Appendix C, at 27c).

On September 19 and 21, 1978, Waterman filed petitions for reconsideration of the Board's Final Opinion and Order insofar as it concerned TR's 5-7-8-9, 6 and 11, and on November 16, 1978, the Board issued an Order Denying Reconsideration. In the Order, the Board reaffirmed its earlier determination that Section 605(c) barred the proposed service on these routes (Appendix D, at 8d).

On September 18, 1978, the day before Waterman filed its first petition for reconsideration, it submitted to the Board a self-styled "Revised Application" for ODS on TR 21, and this application sought, in addition, authority to serve TR's 5-7-8-9, 6 and 11 on a nonsubsidized basis (Appendix L, at 11). Despite the Board's findings—which it had affirmed only five days earlier—that U.S.-flag service on TR 5-7-8-9 was adequate and that Waterman had not shown that its proposed service on TR's 6 and 11 would further the purposes and policy of the Act, the Board approved the Revised Application and entered into ODS Contract No. MA/MSB-450 with Waterman on November 21, 1978 (Appendix L). The letter of the Maritime Administration to Waterman of that date announcing approval of the Revised Application gives no explanation of the statutory authority relied upon by the Board in granting Waterman the requested authority to provide nonsubsidized service on TR's 5-7-8-9, 6 and 11 (*id.*, see in particular at 101—111). No public notice or hearing whatsoever was provided with regard to the Revised Application.

On December 11, 1978 Sea-Land filed a petition for reconsideration of the Board's action of November 21, 1978, only insofar as it authorized Waterman to conduct the nonsubsidized operations (Appendix M). Therein Sea-Land urged the Board to initiate Section 605(c) proceedings on the September 18, 1978 application. On January 19, 1979 the Board issued a brief order denying this petition, as well as one filed by Farrell Lines, Inc. As to the substantive issues raised in the petitions, the Board's order stated only as follows:

> The Board was well aware of these issues when it considered and undertook the actions on November 21, 1978. Neither Sea-Land nor Farrell raise any new issue that was not anticipated and rejected by the Board in its deliberations. We find no basis therefore for reconsidering our action. (Appendix E, at 4e).

Sea-Land then petitioned the Secretary of Commerce for review of the Board's action, and its petition for review was

denied in an Order of February 15, 1979 (Appendix F), the entirety of which is follows:

> The petitions for review of the Maritime Subsidy Board decision have been considered and are hereby denied.

Turning to the terms of the Contract which the Board entered into with Waterman, Contract No. MA/MSB-450, there is, in Appendix A thereof, a description of both the service for which subsidy is provided, and the nonsubsidized operations in which vessels covered by the Contract may engage (Appendix L, at 261-271). It is further provided therein that the operator may conduct the nonsubsidized operations either in conjunction with its subsidized service, or as separate voyages independent of its subsidized service. Where the nonsubsidized operations are conducted in conjunction with the subsidized service, the total time consumed in calling at the U.S. Atlantic Coast ports is not to be included in calculating the subsidy.

II. COURT PROCEEDINGS.

Sea-Land brought suit against the Secretary of Commerce, the Maritime Subsidy Board, and its members, in the United States District Court for the District of Columbia on April 20, 1979, seeking injunctive and other relief against implementation of the provision of the Contract authorizing nonsubsidized operations. The basis for jurisdiction of the action was Sections 1331 and 1337 of the Judicial Code, 28 U.S.C. §§ 1331, 1337. The motion of Waterman to intervene as a party defendant was granted on July 13, 1979. Thereafter, Sea-Land moved for summary judgment, the Federal Defendants moved for judgment on the pleadings, and Waterman moved to dismiss. In its opinion of April 27, 1982 (Appendix G) the District Court treated the defendants' motions as a consolidated motion for summary judgment, and it granted that motion, holding that the provisions of Section 605(c) are applicable only to those operations for which subsidy is being sought. Judgment in favor of defendants was entered on that same date.

Sea-Land then appealed that judgment to the United States Court of Appeals for the District of Columbia Circuit. In

the above-noted opinion issued on December 23, 1983 (Appendix A), the Court affirmed that judgment.

It should also be noted that on December 1, 1983, prior to the issuance of the opinion of the Court of Appeals, Waterman filed a petition for reorganization pursuant to Chapter 11 of the Bankruptcy Code (Case No. 83B 11732 (HCB), Bankruptcy Court for the Southern District of New York). Nevertheless, the issues presented in this case are very important ones, and that development in no way diminishes either their importance, or Sea-Land's need to seek the decision of this Court on them.

REASONS FOR GRANTING THE WRIT

I. THE MARITIME SUBSIDY BOARD'S INTERPRETATION OF SECTION 605(c) OF THE MERCHANT MARINE ACT, 1936, AS BEING INAPPLICABLE TO A PROVISION OF AN OPERATING-DIFFERENTIAL SUBSIDY CONTRACT WHICH WOULD AUTHORIZE NONSUBSIDIZED OPERATIONS BY CONTRACT VESSELS IS NOT ENTITLED TO JUDICIAL DEFERENCE.

A. Criteria For Judicial Deference.

1. Introduction.

This Court, in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), articulated the following rule governing the weight to be accorded to agency rulings and interpretations:

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it

> power to persuade, if lacking power to control. *Id.* at 140.

In 1976 the Court referred to *Skidmore* as the "most comprehensive statement of the role of interpretative rulings." *General Electric Co. v. Gilbert,* 429 U.S. 125, at 141 (1976).

The test utilized by the Court of Appeals in this case was "whether the agency's construction is 'sufficiently reasonable' to be allowed." (Appendix A, at 7a). The Court of Appeals cited two of this Court's cases in support: *Federal Election Commission v. Democratic Senatorial Campaign Committee,* 454 U.S. 27 (1981), and *Train v. Natural Resources Defense Council,* 421 U.S. 60 (1975). However, the Court failed to undertake an analysis of the thoroughness, validity of reasoning, and consistency attendant upon the agency action; instead it focused upon the "linguistics" of the statute itself and the underlying statutory policy to conclude that the "sufficiently reasonable" test had been met.

2. The *Train* Case.

The "sufficiently reasonable" formulation originated with the *Train* case. But, in that case the Court in fact undertook its own extensive analysis of the statute, the legislative history and the decisions of Courts of Appeals in several circuits in order to provide the foundation for its decision. Little actual attention was paid to the agency interpretation, and to the extent that notice was paid, it was descriptive but not analytical. In fact, three years after *Train* was decided, this Court rejected an argument that it should defer to an administrative construction of a statute. *Adamo Wrecking Co. v. United States,* 434 U.S. 275 (1978). The Court dealt with the *Train* case in footnote 5, at 287, as follows:

> In Train v. Natural Resources Defense Council, 421 US 60, 43 L Ed 2d 731, 95 S Ct 1470 (1975), relied upon by Brother Stevens' dissent, this Court was not persuaded by 'a single sentence in the Federal Register,' post, at 301 n 18, 54 L Ed 2d 558, but by our own 'analysis of the structure and legislative history

> of the Clean Air Amendments,' 421 US, at 86, 43 L Ed 2d 731, 95 S Ct 1470, which led us to a result consistent with the Administrator's prior practice.

Further, the Court in *Adamo Wrecking* relied upon the *Skidmore* pronouncement in rejecting the agency construction, stating

> The Administrator's remarks with regard to these regulations clearly demonstrate that he carefully considered available techniques and methods for controlling asbestos emissions, but they give no indication of 'the validity of [his] reasoning' in concluding that he was authorized to promulgate these techniques as an 'emission standard,' within the statutory definition. Since this Court can only speculate as to his reasons for reaching that conclusion, the mere promulgation of a regulation, without a concomitant exegesis of the statutory authority for doing so, obviously lacks 'power to persuade' as to the existence of such authority. *Id.* at 287.

Thus it is clear that the vitality of *Skidmore* is not affected by *Train* and is confirmed by *Adamo Wrecking* and *General Electric Co.*

3. The *Federal Election Commission* Case.

In the other case cited by the Court of Appeals, this Court was faced with the question of the deference to be paid to an agency interpretation which had been rejected by the Court of Appeals. Although disagreeing with the conclusion of the Court of Appeals, this Court said:

> We agree that the thoroughness, validity, and consistency of an agency's reasoning are factors that bear upon the amount of deference to be given an agency's ruling. See Adamo Wrecking Co. v. United States, 434 US 275, 287, n 5, 54 L Ed 2d 538, 98 S Ct 566 (1978); Skidmore v. Swift & Co. 323 US 134, 140, 89 L Ed 124, 65 S Ct 161 (1944). 454 U.S. at 37.

This Court undertook a detailed evaluation of the Federal Election Commission's position, noting the consistency and

unanimity of the Commission's construction of the statute and the three separate reports from the Commission's General Counsel which provided a number of arguments to support the Commission's construction. Then, having concluded that the Commission's repeated interpretation was entitled to deference, the Court applied *Train*'s "sufficiently reasonable" standard and determined that the standard had been met.

Federal Election Commission demonstrates that achievement of the *Train* standard is not to be measured in a vacuum but rather against the well-established criteria enunciated in *Skidmore.*

4. Other Cases.

On several other recent occasions this Court, met with suggestions that an agency interpretation is entitled to deference, has engaged in the kind of analysis set forth in *Skidmore.* For example, in *General Electric Co. v. Gilbert, supra,* Equal Employment Opportunity Commission guidelines were found "not [to] receive high marks when judged by the standards enunciated in Skidmore." *Id.* at 143. The guideline in question was issued eight years after enactment of the statute, but of greater importance was the contradiction between the guideline and an earlier agency interpretation.

Similarly, in *Batterton v. Francis,* 432 U.S. 416 (1977), there was a question of the weight to be given to a regulation promulgated by the former Department of Health, Education and Welfare. The Court held that, because the regulation was adopted pursuant to an express delegation of authority from Congress to prescribe standards for defining the term "unemployment," such regulations have "legislative effect." *Id.* at 425. Footnote 9 at 425 amplified as follows:

> Legislative, or substantive, regulations are 'issued by an agency pursuant to statutory authority and which implement the statute, as, for example, the proxy rules issued by the Securities and Exchange Commission . . . . Such rules have the force and effect of law.' [Citations omitted].

> By way of contrast, a court is not required to give effect to an interpretative regulation. Varying degrees of deference are accorded to administrative interpretations, based on such factors as the timing and consistency of the agency's position, and the nature of its expertise. [Citing *Skidmore* and *General Electric Co.*]

In *SEC v. Sloan,* 436 U.S. 103 (1978), the government argued that the Commission's longstanding and consistent interpretation of a statute was entitled to great deference. Although granting the validity of this proposition as a general principle of law, this Court did not defer to the agency. The Court pointed out that, in none of the instances when the commission had taken the kind of action at issue, had the commission "actually addressed in any detail the statutory authorization under which it took that action." *Id.* at 117. The Court quoted from *Adamo Wrecking* that portion of footnote 5 which refers to *Skidmore:*

> This lack of specific attention to the statutory authorization is especially important in light of this Court's pronouncement in Skidmore v. Swift & Co., 323 US 134, 140, 89 L Ed 124, 65 S Ct 161 (1944), that one factor to be considered in giving weight to an administrative ruling is 'the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors wich give it power to persuade, if lacking power to control.'

More recently, in *St. Martin Lutheran Church v. South Dakota,* 451 U.S. 772 (1981), this Court was urged to adopt the Labor Department's construction of a statutory term. The Court did not do so, and dealt with the government's position as follows, at 783 n. 13:

> The amount of deference due an administrative agency's interpretation of a statute, however, 'will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those

> factors which give it power to persuade, if lacking power to control.' Skidmore v. Swift & Co., 323 US 134, 140, 89 L Ed 124, 65 S. Ct. 161 (1944). Carefully considering the merits of the Secretary's interpretation, we believe it does not warrant deference.

Finally, just three months before the Court of Appeals decision involved in this petition, the same Circuit considered the issue of the deference to be paid to an interpretation by the Department of Health and Human Services of its own regulations. *Saint Mary of Nazareth Hospital Center v. Schweiker,* 718 F.2d 459 (D.C. Cir. 1983). Quoting from both *Skidmore* and *Batterton,* and citing *General Electric Co.,* among other cases, the District of Columbia Circuit held: "In sum, neither consistency nor timing nor expertise weigh heavily in favor of deferring to HHS in this matter." *Id.* at 466.

5. Conclusion.

The Court of Appeals has failed to acknowledge the norms established and repeatedly applied in determining whether an agency opinion or action is entitled to deference. As a result of this failure, the Court of Appeals did not undertake an examination of the way in which the Maritime Subsidy Board and the Secretary of Commerce came to the conclusion that Section 605(c) required no further hearing after the amendment of the Waterman application. Had such an examination been conducted it would have revealed that the criteria spelled out in *Skidmore* were simply not met and consequently that no deference was owed to the agency position.

B. The Board's Interpretation of Section 605(c) Is Not Entitled to Judicial Deference.

1. Introduction.

This section undertakes an evaluation of whether the interpretation by the Board warrants judicial deference. This sort of evaluation was not made by the Court of Appeals, despite the clear and numerous precedents provided by this Court.

2. Thoroughly Considered Construction.

The agency reasoning in adopting its interpretation of Section 605(c) is totally absent. There are only two documents in the administrative record related to the issue presented. One is the Order Denying Requests for Reopening (Appendix E), which contains two sentences simply stating that the Board had previously considered and rejected the arguments made by petitioners. (Of course, as a matter of fact, the specific argument concerning Section 605(c) had not been made previous to Sea-Land's Petition for Reconsideration on December 11, 1978 (Appendix M), and thus could not have been previously considered.) The second document is the one-sentence order denying Secretarial review (Appendix F); it merely says that the petitions have been considered and are denied.

The complete lack of explanation for rejecting the request for a hearing under Section 605(c) is in sharp contrast to the record before this Court in *Federal Election Commission, supra.* There the record included three separate reports from the agency's General Counsel providing analysis and argumentation supportive of the position taken by the Commission. Instead, the present matter is akin to *Adamo Wrecking,* where the Court said that because it could only speculate as to the reasons behind the Administrator's conclusion, "the mere promulgation of a regulation, without a concomitant exegesis of the statutory authority for doing so, obviously lacks 'power to persuade' as to the existence of such authority." 434 U.S. 275 at 287, n. 5. Also similar is *Sloan, supra,* where, despite the numerous times the agency had taken a particular action, it had never offered an explanation of its statutory authority for doing so. Deference was accorded in *Federal Election Commission,* but not accorded in either *Adamo Wrecking* or *Sloan.*

3. Consistent Construction.

The issue whether Section 605(c) requires a hearing for the purpose of considering whether unsubsidized operations may be authorized as an original matter in an operating-differential subsidy contract has not been decided before. This is therefore a matter of first impression, both for the courts and,

more to the point, for the agency. No party in the proceedings below was able to cite any prior decision (formal or informal), any rule or guideline, or any transcript of Board proceedings bearing directly upon this question.

There is a striking contrast between these circumstances and those in *Zenith Radio Corp. v. United States*, 437 U.S. 443 (1978), where the Treasury Department's position had been maintained uniformly for over 80 years. Further, *Udall v. Tallman*, 380 U.S. 1 (1965), is a case where the Secretary of Interior's interpretation had been a matter of public record and discussion long before the origin of the controversy. And in *NLRB v. Hendricks Cty. Rural Electric Membership Corp.*, 454 U.S. 170 (1981), this Court concurred with an administrative interpretation which had existed for over 40 years. However, the duration of the practice or interpretation will not necessarily, of itself, be sufficient to warrant deference, as is demonstrated by the *Sloan* and *St. Martin Lutheran Church* cases, *supra*.

In *Udall v. Tallman, supra*, the Court observed that one reason why courts are reluctant to disturb a long-continued agency interpretation is that affected parties act in reliance upon a settled construction. *Id.* at 17, 18. There is no such reliance, however, where the issue has never before been considered and decided by the agency. In the present matter, there is no history whatsoever of an agency construction. Thus, there is no possibility that reasonable expectations based on past agency performance will be defeated if the agency's action is not upheld.

4. Contemporaneous Construction.

A third factor which this Court considers in determining whether an agency interpretation deserves deference is whether the agency construction or practice was adopted early in the administration of a particular statute. In *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294 (1933), the Court upheld a Tariff Commission practice, noting:

> The practice has peculiar weight when it involves a contemporaneous construction of a statute by the

> men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are untried and new.
> *Id.* at 315.

In *General Electric Co., supra,* a guideline first promulgated eight years after the enactment of the statute was "not a contemporaneous interpretation." *Id.* at 142.

The Maritime Subsidy Board's January 1979 order denying Sea-Land's petition for reopening and reconsideration (in which the Board took the position, for the first time, that the Section 605(c) hearing was not required for the amended application) came over 40 years after the enactment of Section 605(c) as part of the Merchant Marine Act of 1936. By no stretch of the imagination can the Board's construction be considered contemporaneous.

5. Validly Reasoned Construction.

Because of the Board's and the Secretary's summary dismissals of Sea-Land's arguments with respect to the Section 605(c) hearing requirement, what reasoning process led to the Board's conclusion is impossible to divine. However, analogy to similar circumstances establishes patent inconsistency with this particular conclusion.

Most obviously, the interpretation of the Board is inconsistent with General Order 80 of the Maritime Administration, 46 C.F.R. §§ 281.11-281.17. Since 1957, General Order 80 has provided a procedure whereby subsidized operators may seek the permission of the Maritime Administration to make a nonsubsidized voyage, as well as criteria for the granting of such permission. By its terms, it applies where the ODS contract does not specifically authorize the nonsubsidized voyage which the operator wishes to make.

Three provisions of the Order are particularly noteworthy. First, an application for unsubsidized voyage must show a "definite need" for the voyage, 46 C.F.R. § 281.15(a). Clearly, this requirement is in accord with the adequacy of service determination required under Section 605(c).

Second, except as the Maritime Administrator determines otherwise, where the proposed nonsubsidized voyage is on a route on which (1) U.S.-flag berth service is maintained and (2) the subsidized operator does not maintain berth service, there is a special requirement for approval. In such circumstances, the application will not be approved unless the applicant obtains the written consent of the U.S.-flag operators on that route, 46 C.F.R. § 281.11(d). This amounts almost to a *de facto* veto power in the hands of other U.S.-flag operators.

Finally where nonsubsidized voyages are or may become a regular service, the Maritime Administrator is authorized to call a public hearing before making a final decision, and such hearing is to consider evidence on the adequacy of service and such other evidence which he deems pertinent, 46 C.F.R. § 281.13.

It would indeed be anomalous if a proposed nonsubsidized voyage were subject to such scrutiny when not authorized in the contract, but sweeping contract authorization of nonsubsidized voyages could be granted without any hearing of U.S.-flag operators or any formal determination on the adequacy of U.S.-flag service in the affected trade. Clearly, this cannot be the case. General Order 80 was necessarily issued with the view that nonsubsidized operations for which original contract authorization is sought are subject to Section 605(c). Its purpose is to fill the gap in the law that would exist if a subsidized operator were entirely free to make nonsubsidized voyages for which original contract authorization, issued upon proper determinations under Section 605(c), had not been obtained.

The continuing vitality of General Order 80 was affirmed by the Maritime Administrator when he issued a determination making a minor exception to the "consent" requirement of 46 C.F.R. § 281.11(d). That statement provides in part,

> Controls are exercised over non-subsidized operations to ensure that the continuity and quality of subsidized operations will not be adversely affected. Such controls are also intended to safeguard against improper competitive practices and to prevent operations prejudicial to the purposes and policy of the Act. There is thus a need to strike a balance between

operating flexibility for the subsidized operator and adverse impact on other U.S.-flag operators.[5]

In addition, the statutory interpretation at issue here is inconsistent with case decisions of the Board and the courts regarding Section 605(c). Past efforts to limit the scope of that provision, where the limitations would be inconsistent with the language or purpose of the statute, have generally been rejected by the Board. The first such effort was made, in fact, in the very first case dealing with Section 605(c), Docket No. S-1, which was decided by the U.S. Maritime Commission (predecessor of the Board) in 1938.[6] In that case, two carriers which were serving the same route sought long-term operating-differential subsidy for their operations, and one of these carriers was operating under a temporary subsidy contract which had been previously granted. That carrier argued that no subsidy should be awarded to its competitor, and its position was based in part on the contention that the phrase contained in the first clause of Section 605(c), "which would be in addition to the existing service, or services," should be interpreted to mean "which would be in addition to the existing *subsidized* service, or services." In a key decision, this attempt to limit the protection accorded by Secton 605(c) to existing subsidized operators was summarily rejected by the Maritime Commission. As in that case, there is an effort here to read into the statute qualifying language which simply is not there.

Also particularly relevant here are other cases in which the Board considered applications which sought only an increase in the number of vessels to be operated.[7] The subsidized operators in those cases strongly contended that Section 605(c) was inapplicable to their applications, but the Board rejected this position. In its holdings, the Board focused on the fact that Section 605(c) is concerned with vessel service, and despite the fact that the sailings would be performed without additional

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[5] Determination Relative to Certain Non-Subsidized Voyages of Subsidized Operators of Vessels, 46 Fed. Reg. 48198 (1981).

[6] American South African Line, Inc., Seas Shipping Co., Inc., 3 U.S.M.C. 277 (1938).

[7] American President Lines, Ltd., 12 S.R.R. 168 (MSB 1971); Additional Subsidized Service on Trade Routes 29 & 17, 14 S.R.R. 387, at 390-91 (MSB 1974).

subsidy, it held that they did constitute service in addition to existing service within the meaning of Section 605(c). On another matter the Board has held that where an application and the notice thereof did not include a particular service, the applicant cannot add that service to his application during the course of the Section 605(c) hearing thereon. The reason for such holdings is that it is necessary to provide proper notice *prior* to the hearing so that all interested parties will have an opportunity to be heard.[8]

In one major case, however, the Board failed to construe Section 605(c) properly, and intervention by the D.C. Circuit Court of Appeals was necessary to correct the Board's error.[9] In that case, the applicant filed an application which, although substantially different from an earlier application, was denominated as an amendment to it. The Secretary approved the later application, despite the fact that no notice or opportunity for hearing thereon had been provided. In response to the challenge of Sea-Land, the Secretary argued that the notice and opportunity for hearing provided with regard to the earlier application satisfied the statutory requirement with regard to the later application, or that notice of the latter was not required because it was merely an amendment to the earlier application. This position was rejected by the D.C. Circuit which required that Sea-Land, the only carrier which had challenged approval of the application, be accorded a full and fair opportunity to be heard.

This concern that Section 605(c) not be eroded is, of course, well taken. This provision has a vitally important purpose: one that is important to the existing U.S.-flag operators on any particular route, and important to the fulfillment of the broader purposes of the Act.

Consequently, to the extent that General Order 80 and the cases cited above provide illumination as to the reasoning applicable to the question at issue, they lead to a conclusion directly opposed to that reached by the Board and confirmed by the Secretary.

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[8] Lykes Bros. Steamship Co., Inc., 7 S.R.R. 643, at 650 (MSB 1966); States Marine Corp., 1 S.R.R. 1, 5 (MSB 1959).

[9] Sea-Land Service, Inc. v. Connor, 418 F.2d 1142 (D.C. Cir. 1969).

6. Conclusion.

The above sections have reviewed how the facts of this case measure up to this Court's criteria for granting deference to an agency interpretation of a statute which the agency is charged with administering. In summary, the Maritime Subsidy Board's construction of the applicability of Section 605(c)'s hearing requirement to the amended Waterman application

(1) does not represent a thoroughly considered position;

(2) does not represent a consistent position over a significant period of time;

(3) was in no way contemporaneous with enactment of the legislation; and

(4) reflects unexpressed reasoning which is fundamentally at odds with agency regulations and interpretations in related circumstances.

For these reasons, the Court of Appeals erred in paying deference to the agency construction. The Maritime Subsidy Board's interpretation was not due any consideration because it utterly lacked any of the persuasive attributes which would have merited it some deference.

II. IN IMPLEMENTATION OF THE PURPOSES AND POLICY OF THE MERCHANT MARINE ACT, 1936 AND SECTION 605(c) THEREOF, SECTION 605(c) SHOULD BE INTERPRETED TO BE APPLICABLE TO A PROVISION OF AN OPERATING-DIFFERENTIAL SUBSIDY CONTRACT WHICH WOULD AUTHORIZE THE INITIATION OF NONSUBSIDIZED OPERATIONS BY CONTRACT VESSELS, WHERE THOSE OPERATIONS WOULD BE ON AN ESSENTIAL TRADE ROUTE ALREADY SERVED BY OTHER U.S.-FLAG OPERATORS.

A. Introduction.

While the provisions of Section 605(c) of the Merchant Marine Act, 1936 are not addressed in any prior decisions of this

Court, the Court has previously considered other provisions of the maritime subsidy program established under that Act. *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572 (1980). In that case, the Court was very sensitive to the adverse effect that misuse of subsidy could have upon nonsubsidized operators.[10] Here, as is explained in greater detail *infra*, the interpretation of Section 605(c) rendered by the Board could adversely impact subsidized as well as nonsubsidized U.S.-flag operators. This result makes it clear that the interpretation rendered by the Board is contrary to the purpose of that section and of the Act. These purposes are elaborated upon below, but preliminarily, the terms and the statutory context of Section 605(c) should be described.

Sections 601 and 603(a) of the Act, 46 U.S.C. §§ 1171, 1173(a), in pertinent part, authorize the Secretary of Commerce [11] to enter into contracts with U.S. citizens to provide a subsidy for the operation of a particular vessel or vessels on an essential trade route, where (1) such operation is necessary to meet foreign-flag competition, (2) the subsidy is necessary to place the proposed operation on a parity with the operations of foreign competitors, and (3) the applicant meets certain qualifications.

The contracts for operating-differential subsidy—as is evidenced by the contract at issue here—specifically identify the routes on which service is required or authorized (Appendix L, at 261-271), and the vessels which are to provide this service (*id.* at 281). Those vessels are termed "subsidized vessels" in

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[10] Thus regarding the operation in domestic trade of a vessel built with construction-differential subsidy, the Court stated,

> [A] vessel with an outstanding CDS that was completely free to enter and depart the domestic trade would be in an extraordinarily favorable competitive situation even if it was required to repay a proportionate amount of its subsidy whenever it did so. Absent some restriction on its ability to move from one market to the other, it would be a formidable force in both, capable of taking advantage of every shift in trade and profitability, skimming the cream and leaving what remains to those less mobile. It could, in a very real sense, have the best of both worlds. 444 U.S. at 588 (footnote omitted).

[11] See n. 3 *supra*.

the contract.[12] The contracts also prohibit the operator from using the subsidized vessels in any nonsubsidized operation not authorized in the contract, unless the prior approval of the Maritime Administration is obtained.[13] The Maritime Administration regulations governing later requests for approval to make nonsubsidized voyages, which are contained in General Order 80, were discussed above. The authority of the Secretary to enter into ODS contracts was vested in the Board by Departmental Order.[14]

Section 605(c), insofar as herein relevant, provides:

> No contract shall be made under this subchapter with respect to a vessel to be operated in an essential service served by citizens of the United States which would be in addition to the existing service, or services, unless the Secretary of Commerce shall determine after proper hearing of all parties that the service already provided by vessels of United States registry is inadequate, and that in the accomplishment of the purposes and policy of this chapter additional vessels should be operated thereon . . . .

Thus this provision, the first clause of Section 605(c), imposes a key limitation on the authority of the Secretary in the making of contracts where two circumstances are present: the proposed contract provides for a new service on an essential trade route, and that trade route is already served by U.S. citizens.[15] In these circumstances, the Secretary can enter into the contract only if, "after proper hearing of all parties," he makes two

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[12] Contract No. MA/MSB-450, Art. II-28(a).

[13] *Id.*, Art. I-3(d).

[14] Department of Commerce Organization Order 25-2, § 4.a., 45 Fed. Reg. 80857 (1980).

[15] The second clause of Section 605(c) is, under Board precedent, applicable only where the proposed contract concerns an existing service of the applicant, and the two clauses have been treated as being mutually exclusive in their application. *See* Waterman Steamship Corp., Appendix C, at 4c. Because Waterman did not contend in this proceeding that it had existing service on TR's 5-7-8-9, 6 or 11 (Appendix C, at 5c), only the first clause of Section 605(c) is relevant herein. Thus all references herein to Section 605(c) are to the first clause of that provision.

determinations: the current service provided by U.S.-flag vessels is inadequate, and the proposed new service would be in furtherance of the purposes and policies of the Act. The responsibility of the Secretary for conducting hearings and making these determinations was also vested in the Board by Departmental Order.[16]

In the present context, it is noteworthy that the relevant provision of Section 605(c) is not, by its terms, limited to service for which subsidy is being sought. Indeed, the provision contains no reference whatsoever to subsidy or financial aid. Rather, the focus of the provision is on vessel service: that in which the applicant proposes to engage under the terms of his contract, and that already provided by U.S.-flag carriers on the route or routes in question. Put another way, the statute is concerned with *all* services which are to be performed by vessels covered by the contract.

B. Purpose of the Section and of the Act.

As to the purpose of the Act, there can be little disagreement, for its purpose is evident from the Declaration of Policy contained in Section 101 thereof, 46 U.S.C. § 1101. The elements of this provision which are most relevant herein are the following:

> It is necessary for the national defense and development of its foreign . . . commerce that the United States shall have a merchant marine (a) sufficient to carry . . . a substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping service essential for maintaining the flow of such . . . foreign water-borne commerce at all times [and] (b) capable of serving as a naval and military auxiliary in time of war or national emergency . . . . It is declared to be the policy of the United States to foster the development and encourage the maintenance of such a merchant marine.

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[16] Department of Commerce Organization Order 25-2, *supra* n. 14, § 4.b.

Consistent with the overall purpose of the Act, the specific purpose of Section 605(c) is to prevent overtonnaging on the route or routes which are before the Board by virtue of a subsidy application. As the Board has stated,

> Section 605(c) is explicitly aimed against overtonnaging a route, line or service. Congress has specifically delegated this watch-dog duty to the agency.[17]

Other Board decisions and initial decisions of administrative law judges are to the same effect,[18] as is a decision of the District of Columbia Circuit.[19]

The purpose of Section 605(c) of preventing overtonnaging is highlighted in particular by the manner in which the determination on the adequacy of U.S.-flag service on a particular trade route is made thereunder. As was noted above, this determination is one which, under Section 605(c), must be made after proper hearing, and the Board has held that only those persons who provide U.S.-flag service in the trade in question have standing to participate in the hearing.[20]

At the heart of the adequacy determination is a comparison of the cargo pool and the U.S.-flag vessel lift capacity likely to be available at some reasonable point in the future. [21] In this case, for example, in which hearings were held in late 1975 and early 1976, both Sea-Land and Waterman presented, for each of the trade routes in issue, a capacity/cargo forecast for the year 1980, and these forecasts were based on highly detailed analyses of statistical information on these trades.[22]

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[17] Lykes Bros. Steamship Co., Inc., 7 S.R.R. 643, 652 (MSB 1966).

[18] American President Lines, Ltd.—Atlantic/Straits Service, 1 M.A. 143, 159, 172 (1963); Additional Subsidized Service on Trade Routes 29 & 17, 14 S.R.R. 387, 391 (MSB 1974); Waterman Steamship Corp., Appendix B, at 52b-53b.

[19] Sea-Land Service, Inc. v. Kreps, 566 F.2d 763, 774 (D.C. Cir. 1977).

[20] Waterman Steamship Corp., Appendix C, at 26c-27c; National Shipping Corp., 14 S.R.R. 543, 546 (MSB 1974).

[21] *See, e.g.*, Waterman Steamship Corp., Appendix B, at 54b; American President Lines, Ltd., 21 S.R.R. 1, 7 (MSB 1980).

[22] Waterman Steamship Corp., Appendix B, at 17b-45b.

Findings regarding capacity and cargo are made based upon the evidence presented by the parties.[23]

Using these findings, a determination is made on whether U.S.-flag service on the route will be adequate. The test of adequacy established by the Secretary and employed by the Board is whether the U.S.-flag fleet will be capable of lifting the highest percentage of cargo practically attainable without the additional service.[24] The Board does look to, as a rule of thumb for adequacy, whether there will be U.S.-flag capacity capable of carrying 50 percent of the available cargo.[25] However, this is only a rule of thumb, and the true test is whether the U.S.-flag fleet will be capable of lifting the highest percentage of cargo practically attainable.[26]

It is readily apparent that this test of adequacy is fully in accord with the purpose of Section 605(c) of preventing overtonnaging. For if the existing U.S.-flag fleet on a particular route will be capable of lifting the highest percentage of cargo practically attainable, then it follows that any addition of capacity to it would overtonnage the route. It would lead not to any increase in the U.S.-flag share of the trade, but only to a shifting of cargoes among U.S.-flag carriers and unused U.S.-flag capacity in that trade. Such a result clearly would not be in the interest of the U.S.-flag carriers which already serve that route, and thus the Board was quite correct when, in its final opinion in this case, it referred to Section 605(c) as a "simple and pragmatic safeguard to the health of the existing U.S.-flag service . . . ." [27]

Moreover, such a result would be detrimental to the development and maintenance of the U.S.-flag fleet, and thus it would be contrary to the purpose of the Act. In *Sea-Land Service, Inc. v. Kreps,* the District of Columbia Circuit noted that subsidy is awarded to the owners of U.S.-flag vessels, but

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[23] *See, e.g.,* Waterman Steamship Corp., Appendix B, at 45b-47b; Waterman Steamship Corp., Appendix C, at 20c-21c.

[24] Atlantic Express Lines of America, Inc., 1 M.A. 104, 110 (Sec'y of Comm. 1963); Lykes Bros. Steamship Co., Inc. 18 S.R.R. 1389, 1404 (MSB 1978).

[25] *Id.*

[26] Sea-Land Service, Inc. v. Kreps, *supra* n. 19, 566 F.2d at 767 n. 18, 777 n. 69.

[27] Waterman Steamship Corp., Appendix C, at 14c.

the benefit of the subsidy is found in the promotion of the American merchant marine.[28] Likewise, while the immediate beneficiary of the limitation on the authority to make contracts contained in Section 605(c) is the existing U.S.-flag service on a particular route, the ultimate benefit of this limitation is found in the development and maintenance of a healthy American merchant marine.

It should also be noted that the Court of Appeals here, while deferring to the Board's interpretation of Section 605(c), did recognize that authorization to conduct nonsubsidized operations in the circumstances presented here does cause competitive harm to other operators (Appendix A, at 5a). The Court also expressly left open the question of whether the Act requires the Board, in authorizing nonsubsidized operations, to consider their competitive impact, stating, "It may be asserted . . . that equivalent standards [to those of Section 605(c)] or lesser standards should be inferred from the totality of the Act." (*id.* at 7a, n. 3).

C. Applying Section 605(c) to Proposed Nonsubsidized Operations by Subsidized Operators Which Are Otherwise Within Its Terms Is Consistent with the Purpose of the Section and of the Act.

Having ascertained the purpose of Section 605(c) and of the Act, it is now necessary to determine whether application of the provision to proposed nonsubsidized service in the circumstances presented here is consistent with these purposes. The precise circumstances, to repeat, are that the applicant is seeking authority in his contract to conduct nonsubsidized operations with vessels covered by the contract, the operations would be on an essential trade route on which the applicant does not have existing service, and that route is already served by other U.S.-flag operators.

Clearly, application of Section 605(c) to proposed nonsubsidized service in the circumstances herein presented is consistent with the purpose of that provision and of the Act. As

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[28] *Supra* n. 19, 566 F.2d at 777.

established above, the overall purpose is to foster the development of the U.S.-flag fleet by ensuring that contract-authorized operations will not overtonnage an essential trade route. The point that must be stressed in determining the present question is the following: whether or not a vessel is to receive subsidy for a particular operation is irrelevant to a determination on whether that operation would contribute to overtonnaging. If the operation of the vessel on a particular essential trade route would contribute to overtonnaging on that route, then that operation would be detrimental to the remainder of the U.S.-flag fleet on that route regardless of whether that operation is to be subsidized. Thus, applying Section 605(c) to proposed nonsubsidized operations which are otherwise within its terms is not only consistent with the purposes of this section and the Act; such application is essential if these purposes are to be fully realized.

It is not necessary for Sea-Land to construct any hypotheticals in order to illustrate this point, for the facts of this case present one of the more egregious examples of what can happen as a result of a holding that Section 605(c) does not apply to operations for which subsidy is not being sought. This is so for two reasons: first, the contract provision at issue here authorized nonsubsidized operations by a subsidized operator on an essential trade route, TR 5-7-8-9, on which the Board had determined that U.S.-flag service is and will for the foreseeable future be adequate (Appendix C, at 27c); secondly, that contract provision authorized Waterman to conduct the nonsubsidized operations both as separate voyages independent of its subsidized service, and on a deviation basis, that is, as part of and in conjunction with its subsidized service (Appendix L, at 27l).

As a result of these facts, even if Waterman used only the authority to conduct separate nonsubsidized voyages on TR 5-7-8-9, it would be adding capacity to a route on which the Board has determined that U.S.-flag service is and will be adequate. This determination, as noted above, is a determination that the existing U.S.-flag fleet on the route will be capable of lifting the highest percentage of cargo practically attainable.

Put simply, in exercising this authority Waterman would necessarily be overtonnaging the route to the detriment of other U.S.-flag carriers. This is precisely the evil which Congress sought to prevent in Section 605(c). It would, in addition, be detrimental to the development of a healthy U.S.-flag merchant marine and thus would be counter to the overall purpose of the Act.

Moreover, if Waterman used the authority to conduct operations on this trade route on a deviation basis—that is, in conjunction with its subsidized service—the competitive impact upon the remainder of the U.S.-flag fleet would be even greater. The reason for this is that despite the fact that such operations would be labeled as "nonsubsidized operations," they would in reality be conducted almost entirely with subsidy. The contract provides Waterman with subsidy for voyages on TR 21, that is, between ports on the U.S. Gulf and Western Europe (Appendix L, at 26l). TR 5-7-8-9, as noted above, is also a trans-Atlantic route, for it covers the trade between ports on the U.S. North Atlantic and Western Europe.[29] Thus in serving the latter route on a deviation basis, Waterman would stop at the North Atlantic ports to load or discharge cargo both before and after making its subsidized Atlantic crossing. Under the Contract, the time consumed in making the North Atlantic port calls would not be included in the calculation of the subsidy (Appendix L, at 27i). However, Sea-Land calculated that this provision would result in the subsidy being reduced by only about 10 percent.[30] Sea-Land stated this estimate in its briefs in the courts below, and neither Waterman nor the Federal Defendants disputed it. Thus to the extent Waterman serves TR 5-7-8-9 on a deviation basis, not only does it overtonnage the route, but also it does so with operations which are 90 percent subsidized. The significant competitive impact that such operations would have on other U.S.-flag operators on the route is readily apparent.

Before this portion of the argument is completed, one additional point should be made. That is that, as is implicit in

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[29] Maps showing all of the trade routes involved appear as Appendix K hereto.

[30] This figure was based on an estimate that Atlantic Coast calls would consume about three days' steaming and port time as part of an approximately thirty day voyage from the Gulf Coast to Europe and return.

all of the above, the issue presented in this case is not one of subsidized operators versus unsubsidized operators. This point was made quite clearly in this case, because the authorization to Waterman to conduct nonsubsidized operations was protested vociferously to both the Board and the Secretary by Farrell Lines, Inc., which provided *subsidized* service on TR 5-7-8-9 (Appendix E, at 2e). The existing U.S.-flag service on any trade route may consist in whole or in part of subsidized operators, and these operators, as well as unsubsidized ones, stand to be disadvantaged if the decision of the Board limiting the scope of Section 605(c) is upheld.

CONCLUSION

This Court observed in *Federal Election Commission, supra,* that, "[T]he courts are the final authorities on issues of statutory construction." 454 U.S. at 32. Under the decision of the Court of Appeals in this case, the courts would abdicate that role in the face of any agency construction of a statute, and those constructions would be, essentially, unreviewable. It should be stressed that the present case is not merely one of the "thoroughness, validity, and consistency of an agency's reasoning" (454 U.S. at 37) being questionable; it is instead a case in which such reasoning was nonexistent. Consequently, we urge that a writ of certiorari should issue to review the opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of May, 1984, I served three copies of the foregoing Petition for a Writ of Certiorari and the separately filed Appendix upon all parties required to be served. Pursuant to Rule 28.3 and 28.4, service was made upon the Solicitor General by mailing three copies, first-class postage prepaid, to:

Solicitor General
Department of Justice
Washington, D.C. 20530

Pursuant to Rule 28.3 service of three copies each was made upon the following by hand delivery or by mail, first-class postage prepaid:

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.....
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SEA-LAND SERVICE, INC.,
Petitioner,

v.

ELIZABETH HANFORD DOLE,
SECRETARY OF TRANSPORTATION, et al.,
Respondents.

On Writ of Certiorari to
The United States Court of Appeals
For The District of Columbia Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1712

SEA-LAND SERVICE, INC., APPELLANT

v.

ELIZABETH HANFORD DOLE,
SECRETARY OF TRANSPORTATION, ET AL.

Appeal from the United States District Court
for the District of Columbia
(D.C. Civil Action No. 79-01100)

Argued February 22, 1983

Decided December 23, 1983

Edward M. Shea, with whom *John E. Vargo,* was on the brief for appellant.

Charles D. Ossola, Attorney, Department of Justice, with whom *Stanley S. Harris,* United States Attorney, and *Robert S. Greenspan,* Attorney, Department of Justice, were on the brief for appellee, Secretary of Transportation, et al.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Robert A. Peavy, for appellee, Waterman Steamship Corporation.

Before: EDWARDS, BORK and SCALIA, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* SCALIA.

SCALIA, *Circuit Judge:* Sea-Land Service, Inc. ("Sea-Land"), appeals from a district court decision granting summary judgment in favor of appellees in an action brought under the Administrative Procedure Act and the Merchant Marine Act of 1936. Appellant, plaintiff below, contends that appellee the Secretary of Transportation [1] violated § 605(c) of the Merchant Marine Act of 1936, 46 U.S.C. § 1175(c) (Supp. V 1981), by including in an operating differential subsidy contract with appellee Waterman Steamship Company ("Waterman") permission for the subsidized vessels to call on certain ports off the subsidized route without holding a hearing to examine the sufficiency of existing service on the routes thereby affected.

I

The Merchant Marine Act of 1936, ch. 858, 49 Stat. 1985 (codified as amended at 46 U.S.C. §§ 1101-1295g (1976 & Supp. V 1981)), was enacted, according to its declaration of policy, in order to foster an efficient, modern, American-owned and -operated merchant fleet, able to carry a substantial portion of American export and import trade, and able to serve as a naval auxiliary in time of war. *Id.* at § 1101. As amended, the statute establishes a program of construction-differential subsidies, authorizing the Secretary of Transportation to grant a subsidy of up to 50 percent of the cost of constructing new American-flag merchant ships, in exchange for assurances that the subsidized vessels will be used only in foreign commerce. *Id.* at §§ 1151-1161. The Act also establishes a system of operating-differential subsidies ("ODS"), *id.* at §§ 1171-1185, the procedural requirements of which are at issue in this case.

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[1] The Secretary of Commerce and the Maritime Subsidy Board, then a part of the Department of Commerce, were the original government parties to this controversy. After they took the actions giving rise to this appeal Congress passed the Maritime Act of 1981, Pub. L. No. 97-31, 95 Stat. 151 (codified in scattered sections of U.S.C., largely Title 46 (Supp. V 1981)), which transferred the Secretary of Commerce's pertinent duties, the Maritime Administration, and related agencies, to the Department of Transportation.

The ODS program arose from the Congressional belief that, without subsidy, the higher operating costs of American vessels, particularly their labor costs, would render them uncompetitive and drive them out of the merchant marine market. *See* H.R. Rep. No. 1277, 74th Cong., 1st Sess. 13 (1935). Accordingly, the Secretary of Transportation is authorized to enter into contracts granting financial aid to certain vessels operated in United States foreign commerce. 46 U.S.C. § 1171(a) (Supp. V 1981). The ODS program is administered by the Department of Transportation's Maritime Administration, through its Maritime Subsidy Board.

To receive an ODS, an operator must file an application satisfying § 601 of the Act, *id.* at § 1171 (Supp. V 1981), which imposes financing, ownership, and vessel equipment conditions, and requires that the subsidy be used for operation in an essential service. For the purposes here relevant, the Act defines "essential services" as those services, routes and lines that are "determined by the Secretary of Transportation to be essential for the promotion, development, expansion, and maintenance of the foreign commerce of the United States," taking into account various specified factors, including "the intangible benefit the maintenance of any such line may afford to the foreign commerce of the United States, to the national defense, and to other national requirements."[2] 46 U.S.C. § 1121(a) (Supp. V 1981). Section 605 of the Act contains provisions specifically excluding certain vessels from ODS subsidy, including the following provision that is central to the present case.

> No contract shall be made under this subchapter with respect to a vessel to be operated in an essential service served by citizens of the United States which would be in addition to the existing service, or services, unless the Secretary of Transportation shall determine after proper hearing of all parties that the service already provided by vessels of United States registry is inadequate, and that in

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[2] "Essential services" also include bulk cargo carrying services that the Secretary believes should be provided by United States flag vessels (because of foreign commerce, national defense or other national requirements), without regard to the particular routes served. *Id.* at §§ 1171(a), 1121(b).

> the accomplishment of the purposes and policy of this chapter additional vessels should be operated thereon . . . .

46 U.S.C. 1175(c) (Supp. V 1981).

In 1973, Waterman Steamship Corporation applied for an ODS to operate subsidized shipping service for a required number of sailings on Trade Route 21, which runs between the United States Gulf Coast and United Kingdom and European ports. It also sought the privilege of making stops, with subsidy, on Trade Routes 5-7-8-9 and 11, which describe service from North and South Atlantic ports to United Kingdom and European ports, and Trade Route 6, which runs between United States North Atlantic ports and Scandanavian and Baltic ports. In 1975, Waterman filed a separate application seeking an ODS that would require it to serve Trade Routes 5-7-8-9, 6, and 11. In 1977, after published notice of these applications, comments in opposition by other shipping companies, and public hearings, an administrative law judge made the § 605(c) finding that United States flag service on all the trade routes at issue was inadequate, and that Waterman's proposal would serve the purposes of the Act. *Waterman Steamship Corp.*, 17 S.R.R. (P & F) 25, 72 (M.S.B. 1977) (Initial Decision of ALJ). In September of 1978, the Maritime Subsidy Board agreed with the administrative law judge that service on Trade Route 21 was inadequate, and that § 605(c) was not a bar to Waterman's additional service on that route. The Board found, however, that United States flag service on Trade Route 5-7-8-9 was adequate, and that although existing service on Trade Routes 6 and 11 was inadequate, Waterman had not proven its service on those routes would further the policies of the Act. *Waterman Steamship Corp.*, 18 S.R.R. (P & F) 925, 945 (M.S.B. 1978).

On September 18, 1978 Waterman responded to the Board's decision by revising its application for ODS on Trade Route 21, changing the request for permissive *subsidized* calls at the ports served by Trade Routes 5-7-8-9, 6, and 11 to a request for permissive calls on a nonsubsidized deviation basis to load and discharge cargo. (Waterman also sought reconsideration of the Board's prior denial of ODS on those routes, in petitions

dated September 19 and 21, 1978; by order dated November 15, 1978, those petitions were denied. *Waterman Steamship Corp.*, 18 S.R.R. (P & F) 1257 (M.S.B. 1978).) On November 21, 1978 the Board granted Waterman's revised application by letter. The Board noted that its determination on the original application satisfied the requirements of § 605(c), given that Waterman's subsidy was to be limited to operations on Trade Route 21. The Board's letter formed the basis for the ODS contract, specifying the subsidy for Trade Route 21, authorizing nonsubsidized service on the other trade routes, and describing how the subsidy was to be allocated among subsidized and nonsubsidized operations of the same vessel. Sea-Land's petition to reconsider the permission to conduct nonsubsidized operations was denied. *Waterman Steamship Corp.*, 18 S.R.R. (P & F) 1550, 1552 (M.S.B. 1979).

Since the Merchant Marine Act contains no special provision for judicial review of subsidy determinations, Sea-Land brought suit against the government appellees in the United States District Court for the District of Columbia under the so-called nonstatutory review provision of the Administrative Procedure Act, 5 U.S.C. § 703 (1982). Waterman was permitted to intervene as a party defendant. Sea-Land has standing because it operates vessels upon some of the trade routes on which the nonsubsidized operations may be conducted, and will thus suffer competitive harm as a consequence of the Secretary's action allegedly taken "without observance of procedure required by law," 5 U.S.C. § 706(2)(D). *See Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970).

In this appeal from the District Court's award of summary judgment, Sea-Land contends that the Board's action violated § 605(c) which, it claims, requires the Board to hold hearings to investigate the adequacy of existing service before entering into a contract that authorizes even *non*subsidized operations by contract vessels on essential trade routes.

II

The present dispute centers upon the meaning of the phrase in § 605(c) that "[n]o contract shall be made under this subchapter with respect to a vessel to be operated in an essential service . . . unless the Secretary of Transportation shall determine after proper hearing of all parties that the service already provided by vessels of United States registry is inadequate, and that . . . additional vessels should be operated thereon." More specifically, the issue is whether the phrase "with respect to a vessel to be operated in an essential service" refers only to that operation which is the very subject of the contract (i.e., the subsidized operation) or rather embraces all operations specifically permitted by the contract, including (as in the present case) nonsubsidized operations on essential routes.

We note at the outset what this case does *not* involve:

First, it does not involve an assertion that the hearing is necessary in order to prevent what is known as "subsidy leakage"—that is, the use of subsidy funds intended to foster shipping on one route in order to underwrite expenses on another route. Waterman's ODS contract specifically provided that the subsidy would be reduced to account for deviations from Trade Route 21 to ports not on the subsidized route. In the district court, Sea-Land contested the adequacy of this provision to prevent subsidy leakage—but that was for the purpose of demonstrating the injury necessary for standing (a point for which we do not think demonstration of leakage is needed) rather than as the basis for asserting that a hearing was necessary. We would in any event find it impossible to rely upon the potential of subsidy leakage as plausible justification for the asserted hearing requirement, since leakage could as readily occur through the subsidized carrier's use of a *different* vessel on the nonsubsidized route, which would clearly not be subject to the hearing requirement. Where Congress was concerned with subsidy leakage, as it was with regard to the diversion of subsidy for foreign operations to domestic operations, it specifically established

restrictions that prevented all operations of the subsidized contractor in the other trade. *See* 46 U.S.C. § 1223(a) (Supp. V 1981).

Second, the present case does not involve the issue whether the Secretary can permit nonsubsidized operations of contract vessels without considering the impact upon essential services thereby affected. The Secretary has not asserted the irrelevance of such impact to her determination, and the appellant has not asserted that she ignored it; we therefore express no opinion on that point.[3] The sole issue presented is whether, assuming the relevance of such impact, it must be evaluated in a public hearing as required by § 605(c). If so, the contract issued here, revised from the initial request (to permit nonsubsidized operations in essential services) after the § 605 hearing was held, would be invalid. If not, the original hearing applicable only to the subsidized route sufficed.

Our task in a case of this sort is not to provide our own original construction of the governing statute, but rather to determine whether the agency's construction is "sufficiently reasonable" to be allowed. *See Federal Election Commission* v. *Democratic Senatorial Campaign Committee,* 454 U.S. 27, 39 (1981); *Train* v. *Natural Resources Defense Council,* 421 U.S. 60, 70 (1975). Both as a matter of linguistics and as a matter of statutory policy we must conclude that condition exists. It is reasonable if not inevitable to construe the statutory phrase "[n]o contract shall be made . . . with respect to a vessel to be operated in an essential service" to mean "no contract shall be made for the provision of subsidy to a vessel for operations in an essential service"—in which case the subsequently expressed hearing requirement would refer only to the route for which the subsidy was being conferred, and not to any other essential service for which the vessel might be given operating rights. As for statutory policy: We will accept, for the sake of argument

[3] Of course our holding that the hearing requirement of § 605(c) does not apply to nonsubsidized operations on essential services necessarily means that the substantive standards of § 605(c) for determining impermissible impact do not by their terms apply to such operations. It may be asserted, however, that equivalent standards or lesser standards should be inferred from the totality of the Act.

only, Sea-Land's view that the purpose of the statutory scheme is not merely to prevent subsidies from *causing* overtonnaging of essential service routes, but also to use subsidies to *prevent* overtonnaging of such routes (by prohibiting unneeded service by vessels subsidized for other routes). Even on that assumption, it is still reasonable to believe that the former policy, being the stronger and more explicit, was meant to be implemented through mandatory public hearings under § 605(c), whereas the latter was left to be implemented through discretionary hearings and more informal means. The position that the hearing requirement does not apply to nonsubsidized operations is supported by the fact those operations go unaddressed in all the other provisions of this subchapter.

We do not agree with Sea-Land's contention that the Secretary's interpretation is inconsistent with the Maritime Administration's General Order 80, 22 Fed. Reg. 2911 (1957), codified at 46 C.F.R. § 281.11-.17 (1982). That Order governs a contract vessel's nonsubsidized voyages (in essential services) not specifically authorized by the ODS contract. It provides that, in considering applications for approval of such voyages, the Maritime Administrator "*may call* an informal public hearing" (emphasis added) when, in his judgment, "it appears that the individual nonsubsidized voyages for which approval is requested are forming or tending to form a pattern leading to the establishment of a regular nonsubsidized service, or, if in the case where such a nonsubsidized service has already been established, it appears that the operator proposes to continue such service indefinitely." 46 C.F.R. § 281.13(a). The hearing is not only optional but is stated to be "for advisory purposes only." *Id.* Far from supporting the position that § 605(c) requires a hearing for nonsubsidized operations in essential services, General Order 80 tends to establish the opposite. For it enables the same operations which, under Sea-Land's interpretation of § 605(c), would require a public hearing if specifically included in the ODS contract, to be adopted apart from the contract without any hearing at all. Since such a scheme would be senseless if not positively unlawful, General Order 80 seems to assume that no hearing is required under § 605(c).

The Secretary's interpretation of § 605(c) likewise comports with the Board's case precedent. The Board cases Sea-Land cites in support of a hearing requirement involved requests for additional *subsidized* service. *Additional Subsidized Service on Trade Routes 29 & 17,* 4 M.A. 60 (M.S.B. 1974); *Lykes Brothers Steamship Co.,* 2 M.A. 57 (M.S.B. 1966); *American President Lines, Ltd.,* 1 M.A. 143 (M.S.B. 1963) (Atlantic/Straits Service). The Board has specifically said that "the sole concern of Title VI, and particularly Section 605(c), is to avoid subsidizing an essential service that is already adequately served." *In Re National Shipping Corporation ODS Application,* 4 M.A. 189, 191 (M.S.B. 1974). *See also Additional Subsidized Service, supra,* 4 M.A. at 62. Similarly, the cases of this court that Sea-Land cites for the broader proposition that the purpose of § 605(c) is to prevent overtonnaging all involved overtonnaging that would result from additional *subsidized* services. *Sea-Land Service, Inc.* v. *Kreps,* 566 F.2d 763 (D.C. Cir. 1977); *Sea-Land Service, Inc.* v. *Connor,* 418 F.2d 1142 (D.C. Cir. 1969); *see also Aeron Marine Shipping Co.* v. *United States,* 695 F.2d 567 (D.C. Cir. 1982).

The District Court's entry of summary judgment in favor of appelles is

Affirmed.

APPENDIX B

Maritime Subsidy Board
Nos. S-421, S-455

TERMAN STEAMSHIP CORP.—	)	**Initial Decision: January 11, 1977**
S on Gulf-Atlantic/Europe Service	)	**Served: January 17, 1977**

INITIAL DECISION OF WILLIAN G. SPRUILL, CHIEF ADMINISTRATIVE LAW JUDGE

Robert A. Peavy, Esq. and Wayne M. Lee, Esq., Morgan, Lewis & Bockius, Counsel for Waterman Steamship Corporation.

Edward M. Shea, Esq. and Gary R. Edwards, Esq., Ragan & Mason, Counsel for Sea-Land Service, Inc.

Robert G. Giertz, Esq., Public Counsel, Maritime Administration.

I. PROCEDURAL MATTERS

In Docket No. S-421, by an application filed August 17, 1973, as amended, Waterman Steamship Corporation (Waterman or Applicant) seeks a long-term (20 years maximum) operating-differential subsidy (ODS) agreement under Title VI of the Merchant Marine Act, 1936, as amended, (the Act) on service over Trade Route (T.R.) 21 with the privilege of calling at ports on T.R.'s 5-7-8-9, 6, and 11.

In Docket No. S-455, by an application filed June 16, 1975, Waterman seeks a long-term ODS agreement on service over T.R.'s 5-7-8-9, 6, and 11. The applications were duly published in the Federal Register and petitions in opposition were filed by Sea-Land Service, Inc., (Sea-Land), United States Lines, Inc. (USL), and Lykes Bros. Steamship Co., Inc. (Lykes) in one or both proceedings. However, Lykes and USL subsequently withdrew their opposition and only Sea-Land remains opposed to the requested agreement. The matters were separately

referred to the Office of Administrative Law Judges for the purposes of holding hearings and issuing Initial Decisions on the issues set forth in Section 605(c) of the Act. Prehearing conferences were held on August 26, 1975, in Docket No. S-421, and on September 16, 1975, in Docket No. S-455. At the latter conference the proceedings were consolidated over applicant's objections.

Hearings were held on December 9 and 10, 1975; January 12-15, and February 9, 1976, at Washington, D.C. Applicant filed an opening brief on March 15, 1976; Public Counsel and Sea-Land filed answering briefs in opposition on April 19, 1976; and Applicant filed a reply brief on May 3, 1976.

II FACTUAL PRESENTATION

A. Applicant

1. Corporate History

Applicant is a citizen of the United States. It was organized in Mobile, Alabama in 1919. By 1931 it operated 14 vessels and by 1938 it owned and operated 37 vessels in the foreign and domestic commerce of the United States. Following World War II it purchased 55 vessels from the Government and resumed its pre-war service to the United Kingdom, Continental Europe, the Far East, and Puerto Rico as well as initiating service to the Mediterranean, Red Sea, Persian Gulf, and Indian Ocean.

In 1955, Applicant was acquired by McLean Industries, Inc., and two years later it applied for ODS contracts for its services including service between U.S. Gulf and Atlantic ports and ports in the United Kingdom and Western Europe. At the present time, following a series of financial transactions, Applicant is a New York corporation and a wholly-owned subsidiary of Waterman Marine Corporation which, in turn, is owned 50 percent by Waterman Industries Corporation and 50 percent by Transway International Corporation.

2. Vessels

In its system, Applicant operates some 19 U.S.-flag vessels which were constructed in U.S. shipyards, but most of them are more than 20 years of age. Applicant is therefore pursuing a program to upgrade the quality of its fleet. In this regard, applicant arranged for the financing and construction of three LASH[1] vessels and attendant barges and equipment. It further proposes to use Ro/Ro[2] vessels to replace the Mariner class break-bulk vessels now being operated.

The Mariner vessels, in general, have a rated speed of 19.5 knots, bale capacity of over 700,000 cubic feet, and a dead-weight capacity of 14-15,000 tons. These vessels are also capable of carrying 128 TEU's[3] on the weatherdeck and 181 TEU's below deck.

The proposed U.S.-built Ro/Ro vessels with a speed of 23 knots, 1.9 million cubic feet bale capacity, and 19,500 tons dwt, will have roughly the same cargo deadweight, but approximately twice the bale-cubic capacity as the Mariner. This will permit a greater carriage of cargo that will tend to fill the cubic capacity before the weight limitation is reached or so-called "cube out before weight out" cargo. The Ro/Ro design permits the handling of many types of cargo in differing methods of loading. It can handle cargo not suitable for containers, containerized cargo, and containerizable cargo which is tendered in a unitized mode other than in a container. Cargo is driven to or from its place of stowage under its own power, or by tow with forklifts and straddle carriers, through a series of interior ramps and an angled stern access ramp or side port. Thirty-ton capacity cranes are also used for forward hold loadings. The maximum theoretical capacity for transporting containers would be 823 TEU's.

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[1] An acronym for "Lighter Aboard Ship" to designate one type of barge or lighter carrying vessel.

[2] An acronym for "roll on/roll off" to designate the method of cargo loan and discharge involving the use of wheeled vehicles.

[3] Twenty-foot equivalent units—a unit measure which would accommodate a container cube measuring 8′ × 8′ × 20′.

Applicant proposes to have the Ro/Ro's introduced into service in mid-1979. However, at the present time it has not entered into any contract for the production of the Ro/Ro vessels. Moreover, applicant stated that it would not contract for the Ro/Ro vessels unless it receives a long-term subsidy.

3. Existing Service

Applicant presently conducts operates in three services as follows:

(a) U.S. Gulf/Western Europe and Scandinavia over T.R. 21 pursuant to a short-term ODS awarded in 1973;

(b) U.S. Atlantic and Gulf/Red Sea, Persian Gulf and Indian Ocean over T.R. 18, pursuant to a long-term ODS contract using three LASH vessels with two more planned; and

(c) U.S. Atlantic and Gulf/Far East over T.R.'s 12 and 22, pursuant to a short-term ODS which was recently renewed[4] involving replacement with LASH vessels.

In its T.R. 21 service, Waterman operates an itinerary similar in scope to that proposed in its Gulf itinerary. Of the sailings involving general cargo, for a six year period from 1966 through 1971, Waterman averaged 29 annual sailings with a range from 19 to 36. For a four year period from 1972 through 1975, Waterman averaged eight annual sailings with a range from 3[5] to 16.

The recent T.R. 21 service has also been irregular. Five of the six voyages in 1974 began between the middle of July and the first of October.[6] Service was suspended on T.R. 21 from September 1973 for some 10 months ending in July 1974. In 1975, seven of the 16 sailings began in June, July, and August

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[4] Docket Nos. S-336 and S-390, Waterman Steamship Corporation-ODS T.R.'s 12 and 22, MSB Final Opinion and Order [16 SRR 1357], served August 6, 1976.

[5] 1972 sailings were actually 10 in number, but seven of these were exclusive MSC shipments.

[6] The five detailed voyages were with Mariner vessels while the other voyage was with a C-2 vessel and undetailed.

while the other nine were conducted on a one sailing per month frequency. Waterman attributes these reductions and irregularities to problems encountered in Waterman's vessel replacement program in 1973-74 and accidents in 1975.

Operations on T.R.'s 5-7-8-9, 6, and 11 have not been significant. From 1970-1974 Waterman conducted 40 inbound and 17 outbound sailings which involved the Atlantic/Europe trade. However, from 1972-1974 only one outbound and three inbound sailings on these routes are noted (excluding MSC exclusive sailings). During 1975, Waterman received permission to deviate from its T.R. 21 operation and made two Atlantic calls. Cargo was carried to Holland and Leningrad. No Scandinavian ports were called from 1970 to 1974.

4. Proposed Service

In S-421, Applicant proposes a minimum of 20 and a maximum of 35 sailings annually on T.R. 21 with the privilege of calling at ports on T.R.'s 5-7-8-9, 6, and 11 on up to 24 sailings annually. In S-455, Applicant proposes a minimum of 20 and a maximum of 35 sailings annually on T.R.'s 5-7-8-9, 6 and 11. All of the involved trade routes have been determined to be essential trade routes as defined and required by the Act. The sailings will be conducted initially with Mariner class vessels which will be replaced by Ro/Ro vessels in 1980.

The involved trade routes cover trade between the following areas:

Trade Route	U.S. Area	Foreign Area
21	Gulf (Key West-Texas)	Western Europe (United Kingdom, Ireland and Continental Europe north of Portugal)
5-7-8-9	North Atlantic (Me.-Va.)	Western Europe (United Kingdom, Ireland and Continental Europe north of Portugal to Germany south of Denmark)
6	North Atlantic (Me.-Va.)	Scandinavia and Baltic Countries, Ireland, Greenland, and Newfoundland
11	South Atlantic (North Carolina-Florida except Key West)	Western Europe (United Kingdom, Ireland and Continental Europe north of Portugal)

Waterman's service proposal would be to operate from the U.S. Gulf and Atlantic Coast port ranges to various European, Scandinavian, and Baltic countries, including ports in the USSR east of Finland in the Barents Sea. The itineraries would embrace:

(1) A Gulf itinerary for direct sailings between the Gulf ports and Western Europe, United Kingdom, Scandinavia, and Baltic ports (T.R. 21);

(2) An Atlantic itinerary for direct sailings between North and South Atlantic ports and the same foreign areas noted above (T.R.'s 5-7-8-9, 6, and 11); and

(3) A combination itinerary for sailings between combinations of Gulf, South Atlantic, and North Atlantic ports and the foreign areas noted (T.R.'s 21, 11, 5-7-8-9, 6, and 11).

The Mariner vessel operation will call certain Gulf ports on a 16-day frequency[7] and 48-day turnaround. Three vessels will be used for this service which will produce 22 Gulf sailings annually. Of the 22 Gulf sailings, 11 will also make privilege calls at Atlantic ports. Two vessels will be used for Atlantic itineraries on a 32-day turnaround which will produce 22 Atlantic sailings annually. By counting the combination itinerary calls, Atlantic ports would be called on an 11-day frequency. The result is a proposed total of 44 sailings annually to be conducted with five different Mariner vessels which, by counting combinations of calls on each sailing will make 22 Gulf port calls on a 16-day frequency and 33 Atlantic port calls on an 11-day frequency.[8] The time involved is such that all ports cannot be called on all sailings. On the Atlantic Itinerary, calls to the South Atlantic, United Kingdom, and Baltic ports would be on the basis of cargo availability. However, of the itineraries proposed, if an additional call should be scheduled, one of the presently scheduled calls would have to be eliminated. Of the destinations, Bremerhaven and Rotterdam are scheduled on each sailing while service to the other ports will vary.

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[7] Only New Orleans and Houston are called every 16 days, the other ports are called 11 times annually without a specified frequency.

[8] Of the scheduled Atlantic ports, each one is not called on each itinerary.

The Ro/Ro vessel itinerary operation is the same as that proposed for the Mariners. Waterman presently plans to use three Ro/Ro's to replace the five Mariners, but a fourth Ro/Ro would be considered. One of the Ro/Ro's would be deployed on each of the Gulf, Atlantic, and Combination itineraries, while a fourth, if required, would be allocated among the itineraries as needed. The turnaround time for the Gulf Itinerary would be 35 days or 10 sailings annually. The same time and number of sailings would also apply to the Combination Itinerary. The total Gulf calls with these two vessels and two itineraries would be 20 annually. The Atlantic Itinerary would have a 25-day turnaround with 14 sailings annually. The total Atlantic calls with two vessels and two itineraries would be 24. The annual service total would be 34 sailings with three vessels calling the Gulf 20 times and the Atlantic 24 times.

5. Cargo

Waterman's cargo movements on T.R. 21 in long tons and revenue tons, broken down by class are shown as follows:

Outbound

Year	Sailings	General		MSC		Container		Totals***	
		LT	RT	LT	RT	LT	RT	LT	RT
1972	10*	816	5,446	25,679	86,859	0	0	26,495	92,305
1973	8	2,917	16,270	7,194	30,199	0	0	10,111	46,469
1974	6	2,899	14,245	5,828	33,058	50	151	8,777	47,454
1975**	17	36,717	89,829	11,779	32,296	391	669	48,887	142,794

Inbound

1972	10*	2,108	13,944	15,196	66,107	0	0	17,304	81,051
1973	8	6,479	41,504	3,824	14,824	0	0	10,303	56,328
1974	6	6,329	17,866	5,323	19,806	161	229	11,813	37,901
1975**	17	15,603	68,204	4,656	19,435	3,112	3,343	23,471	91,982

* Three sailings carried general cargo, noted supra, and seven sailings were exclusive MSC.

** Annualized from nine-month figures.

*** There is some variance between WS-8 cargo movement figures used here and WS-9 utilized cargo dwt figures.

The Vessel utilization for this same period has been.

Percent Utilization

	Outbound		Inbound	
	Dwt.	Cubic	Dwt.	Cubic
1972	42	94	33	80
1973	28	99	28	98
1974	30	91	33	74
1975	37	86	27	61

Waterman has attained a high bale-cubic utilization with a low weight utilization, which leads to the conclusion that the cargo will "cube out before it weights out."

The movement of containers in Applicant's operations here has changed from an insignificant amount to a small or minor amount outbound and a recognizable amount inbound. Also, the earlier predominant movement of MSC[9] cargo (93 percent) was reduced to approximately 24 percent of the LT's for 1975. The RT's show a similar MSC relationship inbound but outbound MSC RT was close to 37 percent of the total RT.

Waterman charges to MSC cargo only that cargo which moves under a through government bill of lading in recording information for S-244 requirements. (46 CFR § 280) Government or civilian impelled preference cargo of household goods or personal effects is included as commercial cargo even though foreign-flag carriers can handle such cargo only when a U.S.-flag service is not available. Such cargo was not shown as a separate category.

Applicant's cargo movement has been predominantly to Holland and Germany although movements to the USSR ranked second in 1975. The range of commodities has been broad and includes chemicals, machinery and parts, cotton, vehicles, lumber, wood resin, metals, personal effects, household goods, and synthetic rubber. To the U.S., commodities have included machine and auto parts, engines, machinery, construction materials, chemicals, glassware, steel products, and household goods.

[9] Military sealift command—government impelled preference cargo.

B. U.S.-FLAG SERVICE

1. American Export Lines, Inc.

AEL operates a weekly service on T.R. 5-7-8-9 with three vessels having a capacity of 1070 TEU's each. It provides a break-bulk service on T.R.'s 6, 11, and 21, via transshipment, using C-3 vessels. These vessels have a capacity of 505,000; 548,000; and 705,000 cubic feet. AEL has also considered the institution of a Gulf/Europe minibridge service via the Atlantic Coast.

The following data shows AEL's recent operations on T.R. 5-7-8-9:

	Sailings	LT	TEU available	TEU used	percent utilization
Outbound					
1974	45	309,545	47,678	39,305	82
1975*	50	371,064	50,196	45,380	90
Inbound					
1974	43	244,833	45,538	32,487	71
1975*	48	199,724	47,584	25,942	55

Similar information is shown for T.R.'s 6, 11, 6,11, and 21:

					percent utilization	
	Sailings	LT	DWT available	Cu. Ft.	dwt	cubic
Outbound						
1974	7	37,581	55,676	3,550,129	67	50
1975*	10	34,456	76,366	4,606,326	68	77
Inbound						
1974	8	37,551	63,918	4,099,590	59	76
1975*	10	18,970	76,366	3,803,692	28	59

* Annualized from 6-month data

2. United States Lines, Inc.

USL operates a bi-weekly containership service on T.R.'s 5-7-8-9 and 11 with eight vessels having a capacity of 1,009 TEU's each. These vessels are full containerships and USL does not operate capacity for other than container cargo.

Service to Scandinavian countries on T.R.'s 11 or 6 is performed by transshipment.

The following data shows USL's recent operations on T.R.'s 5-7-8-9 and 11:

	Sailings	LT	TEU available	TEU used	percent utilization
Outbound					
1974	88	569,276	87,032	84,984	98
1975*	90	485,654	87,290	73,722	84
Inbound					
1974	86	479,585	85,094	67,917	80
1975*	90	320,792	86,970	46,062	53

* Annualized

3. Lykes Bros. Steamship Co., Inc.

Lykes operates three Sea-Bee[10] class vessels on T.R. 21. It does not operate on T.R. 5-7-8-9 nor does it operate regular sailings on T.R.'s 6 or 11. Each vessel has a maximum break-bulk capacity of approximately 30,000 tons dwt. In addition, the vessel has the capacity of carrying 160 forty-foot containers (320 TEU's). Container adapters may also substitute for some barges to allow the vessel a range of 280 to 520 TEU's for containers. The following data shows Lykes' recent operations on T.R. 21:

	Sailings	LT	MT[11] available	MT used	percent MT B/B utilization
Outbound					
1973	30	404,616	—	—	—
1974	30	436,784	694,397	625,669	90
1975*	—	—	690,602	569,614	83
Inbound					
1973	27	228,860	—	—	—
1974	29	421,891	696,383	562,274	81
1975*	—	—	705,750	407,404	58

[10] An acronym for "Sea Barge" to designate one type of barge carrying vessel.

[11] Lykes' data are expressed in measurement tons. A measurement ton is 40 cubic feet.

The container utilization was shown as:

	TEU's available	TEU's utilized	percent MT B/B utilization
Outbound			
1974	12,408	8,812	71
1975*	10,736	7,212	67
Inbound			
1974	12,276	8,758	71
1975*	9,552	3,046	64

* Annualized

Lykes' vessels have a technical capability based on design speed to make 36 annual sailings, but it has slowed its vessels, extended the ports served, and has had vessels undergoing shipyard work. Sea-Land contends that Lykes has failed to accomplish its contract minimum sailings of 24 in 1975 because of poor cargo conditions. In support Sea-Land requests that official notice be taken of certain letters from Lykes to MarAd which arguably would lend support to Sea-Land's position. These letters are not the proper subjects for official notice inasmuch as they are not public documents issued by an authoritative body and reasonably available to the public.[12] Their use in this proceeding is of questionable value. Sea-Land's request is denied.

4. Sea-Land Service, Inc.

Sea-Land is an unsubsidized U.S.-flag steamship company operating in domestic and foreign commerce. Sea-Land commenced operations in 1956 with coastwise service between Texas and the North Atlantic. In 1962, Sea-Land commenced intercoastal service between the U.S. Atlantic and Pacific Coasts and it began foreign commerce operations during 1966 with container service between New York and several European ports. In 1970, it commenced operations between the U.S. North Atlantic and the Mediterranean, and in 1972, Sea-Land began operations between the U.S. Gulf and Europe. Line-haul and feeder vessels employed by Sea-Land on the involved routes have been fully cellularized for handling containers, and virtually all cargo carried by Sea-Land on these

[12] Rules of Practice and Procedure, 46 CFR § 201.132(g).

routes is containerized. Sea-Land now operates three SL-7 class containerships in trans-Atlantic service. These vessels have a container capacity of 2,067 TEU's and a rated speed of 33 knots. In the U.S. Gulf and South Atlantic/Europe service, Sea-Land operates four SL-18 class containerships. The SL-18's have a container capacity of approximately 1,400 TEU's and a rated speed of 23 knots.

Until recently, Sea-Land operated two of the SL-7 vessels on a weekly schedule between Elizabeth, New Jersey, Rotterdam, and Bremerhaven at approximately 29 knots. Sea-Land has now introduced a third SL-7 and added Portsmouth, Virginia to the itinerary. The vessels continue to operate on a weekly schedule requiring a speed of 25 knots on a 21-day turnaround. Sea-Land operates feeder vessels between Elizabeth and other Atlantic ports for transshipment aboard the SL-7's. A similar feeder and transshipment operation is conducted between Charleston and Elizabeth.

In Europe, Sea-Land employs a fleet of foreign-flag feeder vessels on transshipment of cargo to and from certain ports not served directly by the SL-7's and SL-18's. On the Atlantic side, Sea-Land employs U.S.-flag feeder vessels for transshipment of cargoes to and from ports not served directly by the line haul vessels.

Military Sealift Command statistics show Sea-Land to be the single largest carrier of military cargo from the U.S. Atlantic Coast to Continental Europe, the United Kingdom, and Ireland. Sea-Land also carries government employees' household goods and personal effects under commercial bills of lading as "general" cargo.

Sea-Land data shows the following utilization of container spaces of its transAtlantic vessels:

	TEU's available	TEU's utilized	percent utilization
Outbound			
1974	110,083	107,213	97.4
1975*	101,928	71,012	69.7
Inbound			
1974	110,386	101,177	91.7
1975*	106,004	60,384	57.0

* Annualized

Sea-Land has not made any allocation between the particular routes.

Sea-Land began operations on T.R. 21 in September 1972. When Sea-Land commenced T.R. 21 service, it was already established as the low-cost bidder to MSC for carriage of U.S. Gulf/Continent military containers. Sea-Land has retained this low-bid position through each semi-annual request for proposal cycle until the one most current (January 1—June 30, 1976) when it was underbid by Lykes. In each of the six instances during 1974-75 in which Sea-Land and Waterman submitted competing bids, Sea-Land's rate was below that of Waterman.

The following data shows Sea-Land's recent operation on T.R. 21:

	sailings	LT	TEU available	TEU utilized	percent utilization
Outbound					
1974	32	507,383	44,828	43,594	97.2
1975*	52	504,272	70,316	59,886	85.2
Inbound					
1974	33	250,805	43,436	41,301	95.1
1975*	52	277,428	67,590	47,954	70.9

* Annualized

During its first ten years of operation in foreign commerce Sea-Land has experienced growth and continuous expansion. It has multiplied the routes on which it operates, increased its container fleet, equipment and facilities, and expanded its participation in the container traffic on each route. At the same time, foreign lines have been upgrading their vessels and services in the U.S. foreign commerce over the past decade. Likewise, U.S.-flag lines have been operating under long-term ODS contracts which contemplate vessel replacement and service obligations.

Although Sea-Land's vessels have the capability of operating an increased number of sailings, increased bunker costs will result from any increases in speed. Inasmuch as bunker costs are an important factor influencing vessel operations and inasmuch as Sea-Land has indicated that it intends to operate

at reduced speeds in the foreseeable future—using the increased additional speed capability for flexibility of operations if conditions did so require—it is apparent that Sea-Land will continue its present weekly schedule.

C. HISTORICAL RELEVANT CARGO DATA

There is no showing sufficient to warrant a limitation or exclusion of the liner cargo pool to any specialized segment such as containerized or non-containerized cargo. Moreover, there is no showing that any specific commodity should be excluded from the relevant liner cargo pool. However, the inclusion of non-liner cargo (which might include bulk or other items not normally handled in liner trade) is not warranted despite applicant's assertion that it would compete for such traffic—including bulk—in view of the de minimus showing of the past U.S.-flag participation in such non-liner cargo movements. The inclusion of such cargo would tend to overstate the trade for which applicant, or other U.S.-flag carriers, might be considered competitive.

There are two major sources of published information on foreign trade. The Maritime Administration collects data from the operators of vessels that enter or leave U.S. ports to or from foreign ports. This data reports tonnage movements by port of lading and port of unlading, but it is not classified by commodity or value. These tonnage figures are given by the vessel operators involved and are taken from Bureau of the Census export declaration or import entry forms or documents derived therefrom. There is no significant amount of actual weighing of cargo by the carriers to arrive at movement tonnages. The information is submitted by the operators on MarAd Forms MA-721 and MA-722, which included a defense cargo category but not limited or broken down between commercial or government bills of lading.

The other major source of published foreign trade data is the Bureau of Census, which uses copies of the export declarations and the import entry forms to prepare detailed trade data. The Census Bureau provides a printed report summarizing

port-to-port movements, and it also supplies a tape to MarAd with additional data not included on the public use tape, including the country code for the flag of the vessels. MarAd provides the use of a tape of these records including summary records which separate cargo moved in U.S.-flag vessels and cargo moved in foreign-flag vessels. Defense cargo is also included but only that which moves on a commercial bill such as household goods.

The Bureau of Census publishes a monthly report and annual summary of the weight and value of U.S. foreign trade on its FT 985 report. MarAd also uses the MA-721 and MA-722 reports to develop another table Foreign Trade Cargo—Report FT 846.

Another report that covers part of these trade movements is MarAd Containerized Cargo Statistics 1973, developed from Form MA-578A. MarAd has reported this data in two forms: in a publication segregating the containerized cargo movements by U.S.-flag and foreign-flag carriers for some trade routes, and in a table categorizing the carryings by country of lading or unlading.

The various data differ in several ways. For one thing, it is unclear what amounts of defense cargo are involved. Also there are various minor differences as to the method of reporting and the inclusion or exclusion of certain movements such as intransit movements. The MarAd data assigns to a particular trade route the port of final lading rather than port of origin so that a movement which originated at a Gulf port and was transshipped to an Atlantic port for carriage to Europe would be credited as Atlantic traffic on the transshipment, but as Gulf traffic if the lading continued from the Atlantic port without being transferred to another vessel for the trans-Atlantic portion of the voyage. The parties generally approve the data of the Census Bureau origin as the more reliable, but there is even a variance in the different reports using census data. The tables attached hereto as Appendix A summarize the various data submitted and arrayed by the parties. The different sources have been averaged to account for differences in the various approaches and to avoid extremes. Inasmuch as

census data is entered in more than one related data compilation, the average in the more complete years from 1971-1973 is weighted somewhat toward the census figure which is the source preferred by the parties.

It is recognized that defense or military cargo which is preference cargo should be excluded. However, there is no breakdown of figures which will permit this exclusion. The FT 846 data is not higher than the census data in all instances so the conclusion cannot be drawn that the FT data is inflated over the census data by the amount of government preference cargo. Also, it is not totally clear that the excludable defense cargo is included in the published reports because the source form permits the carrier to make its own definition of "defense" cargo which might have been limited to defense cargo on commercial bills of lading. It is concluded that the averaging method here adopted will avoid any undue influence on the statistics from the transportation of preference cargo without specific exclusion. Finally, it is noted that the parties do not take issue on this matter. This average figure will be used herein as the reasonable approximation of U.S. foreign trade

over the involved trade routes, by year from 1967-1973, as follows:

TABLE I

Historical U.S. Foreign Trade Data[13] (/000 LT)

Year	T.R. 5-7-8-9			Trade Route 6			Trade Route 11			Trade Route 21		
	Total	U.S. flag	% U.S.	Total	U.S. flag	% U.S.	Total	U.S. flag	% U.S.	Total	U.S. flag	% U.S.
Imports												
1967	2,538	726	29	847	88	10	665	90	14	885	102	12
1968	3,188	810	25	841	73	9	613	106	13	673	120	18
1969	2,579	850	33	656	66	10	395	58	15	576	109	19
1970	3,091	1,084	35	708	73	10	453	5	1	877	91	10
1971	3,207	992	31	623	38	6	469	10	2	1,396	97	7
1972	3,282	1,004	31	687	51	7	593	12	2	1,354	90	7
1973	3,848	1,307	34	758	76	10	708	68	10	1,391	330	24
1974*	3,974	1,382	35	613	28	5	670	58	9	1,743	614	35
Exports												
1967	1,957	518	26	329	70	5	574	85	5	2,088	167	8
1968	1,902	506	27	299	67	17	623	106	17	1,682	169	10
1969	1,851	529	29	291	53	12	531	63	12	1,430	102	7
1970	2,456	727	30	244	55	4	699	3	4	2,008	184	9
1971	2,052	667	33	250	10	3	537	12	2	1,816	91	5
1972	2,142	640	30	241	9	3	639	18	3	1,727	131	8
1973	2,698	888	33	314	18	14	838	117	14	2,233	603	27
1974*	3,371	1,144	34	391	20	13	995	133	13	2,212	725	33

* Preliminary data

D. THE CARGO FORECAST

Testimony with regard to future cargo movements was presented on behalf of Waterman by Bertram E. Rifas, Program Director of Manalytics, Inc., while Leo J. Donovan, associated with Booz, Allen & Hamilton, Inc., testified on behalf of Sea-Land. However, Donovan did not offer a

[13] From Appendix A, Average of Arrayed Data.

separate cargo forecast. Donovan adopted Rifas' forecast for use in analyzing capacity projections even though he criticized the Rifas cargo forecast as being unduly optimistic.

1. Manalytics—Rifas

In his approach—and differing from the treatment of historical cargo data previously made by the administrative law judge—Rifas adopted census data as the more accurate cargo report, and showed cargo movements as follows:

Rifas' Data on Liner Cargo
(/000 LT)

Trade Route	1969	1970	1971	1972	1973
			Imports		
5-7-8-9	2,585	3,106	3,272	3,162	3,683
6	656	717	657	706	789
11	330	394	453	558	665
21	577	879	1,408	1,326	1,357
Total	4,148	5,096	5,790	5,752	6,494
			Exports		
5-7-8-9	1,863	2,479	2,007	2,041	2,586
6	293	348	252	245	325
11	530	697	550	653	836
21	1,438	2,009	1,876	1,856	2,334
Total	4,125	5,533	4,685	4,795	6,082

Under this cargo analysis, Rifas points out that liner commercial cargo between ports on the U.S. Atlantic and Gulf coasts and ports in northern Europe totaled 6,494,000 long tons of imports and 6,082,000 long tons of exports during 1973, and that these cargo levels represent an average annual increase above the 1969 cargo levels of 11.9 percent for imports and 10.2 percent for exports. He concedes, however, that he did not calculate any other five year period to determine if the results are consistent, but he states that the latest period is usually the most significant period.

Rifas annualized the most recent data for military cargo movements based on the first nine months of the fiscal year ending June 30, 1975. This shows an annual rate of 1,720,000

measurement tons outbound and 226,000 measurement tons inbound in liner service moving from the U.S. Atlantic and Gulf coasts to northern Europe, and that more than 95 percent of the defense cargo from the Atlantic Coast moves on Trade Routes 5-7-8-9. In his forecast of military cargo he predicts that shipments will continue to move in the future between the U.S. Atlantic and Gulf coasts and northern Europe at the same pace as the five year average between 1969 and 1973. Accordingly, he forecasts an annual level of military cargo shipments of 1,593,000 measurement tons outbound and 273,000 measurement tons inbound.

Rifas' cargo forecast for 1980 is based on the assumption that real gross national product determines a region's real imports. He states that there is a long-run trend, which is only temporarily stalled by recessions. Rifas states that the U.S. balance of trade should improve dramatically by 1980 and that differential rates of inflation between countries will be offset by currency changes, which will not affect the movements of international cargo. Rifas also states that the large increase in petroleum prices will not result in a substantial decline in foreign trade. This is because the oil producing nations will utilize their excess funds to increase imports and to lend money to the oil consuming nations. Rifas estimates, however, that a reduction in imports will be necessary to compensate for one-third of the higher price of petroleum.

Rifas used a macroeconomic model based on real gross national product and its relation to imports in order to forecast liner tonnages for 1980 on Trade Routes 5-7-8-9, 6, 11, and 21. This year was picked because it is the first full year that the Ro/Ro ships which Waterman proposes to build would be in operation. Rifas states that there is a high correlation between gross national product and imports, but he concedes that he did not test the correlation between the number of tons of liner cargo imported, as opposed to imports total, and the growth of gross national product during any period of time.

Inasmuch as gross national product represents spendable income, a higher gross national product would permit more imports to be purchased. Moreover, production at higher levels

of gross national product requires more imports to be used in the production process. The important relationship is between tons of imports and real gross national product, since a trade value figure that is raised because of inflation will not signify higher tonnages.

Rifas determined the real gross national product for each country for the years 1967 through 1973, in terms of U.S. dollar value, by deflating the gross national product of each country by its local consumer price index and by converting each year's local real gross national product by the 1974 exchange rate. He then determined the real imports of each country for the years 1967 through 1973 by deflating them for the country's local import price index. Real imports were then converted into U.S. dollar values.

Rifas forecasts real gross national product, based upon 1970 prices, to be $1,307.1 billion in 1980. This forecast was made by extrapolating the real U.S. growth rate between 1967 and 1973 into the future. Because of the severity of the recent recession in the United States, an adjustment was made by reducing gross national product by 18 months of growth. Rifas forecast that U.S. real imports will equal 6.03 percent of its real gross national product in 1980. This figure was adjusted downward from 7.23 percent, which was obtained by extrapolating the continuous growth trend to 1980. Rifas forecasts that the European contributions to U.S. imports will be 18.9 percent, a figure slightly below the 1973 level of 21.25 percent. This adjusted forecast is based upon the average of the 1980 unadjusted forecast and the 1973 actual level of imports, modified by a downward adjustment to compensate for the higher price of oil. He also forecasts that each $1,000 of uninflated U.S. imports will represent .655 long tons of liner imports. Accordingly, he predicts a total of 9,762,000 long tons of U.S. liner imports from Europe for 1980.

The share of the four involved trade routes on U.S. imports from Europe has been rising steadily, and Rifas forecasts that these routes will have 88.1 percent of the traffic in 1980, compared with 85 percent in 1973. Accordingly, he asserts that there will be about 8,600,000 long tons of U.S. liner imports in

1980. His forecast of U.S. imports in 1980 includes 4,876,000 long tons on T.R. 5-7-8-9; 1,049,000 long tons on T.R. 6; 877,000 long tons on T.R. 11; and 1,797,000 long tons on T.R. 21.

Rifas used the same method to determine U.S. exports in 1980. He derived from a forecast of real gross national product and real imports for each European country in 1980, the forecast of exports in the amount of 9,430,000 long tons. He forecasts 1980 traffic of 4,017,000 long tons on T.R. 5-7-8-9; 500,000 long tons of T.R. 6; 1,292,000 long tons on T.R. 11; and 2,621,000 long tons of T.R. 21.

In his forecast of exports, Rifas penalizes the growth of gross national product in European countries by 12-months growth, although he adjusted the U.S. gross national downward by 18-months growth. Rifas rationalizes this discrepancy by stating that the United States suffered a more prolonged than average downturn. Rifas does not consider the possibility, however, that the United States recession might have occurred earlier than the recession in Europe. The evidence shows that the general rule of economic forecasting is to reduce future levels of gross national product by about one year's growth due to the consequences of a recession. Accordingly, it appears that this adjustment by Rifas serves to understate somewhat the United States imports in 1980, particularly when compared with exports.

2. Booz, Allen & Hamilton—Donovan

Donovan did not forecast future cargo movements, but made various observations concerning the Rifas forecast. Donovan notes that in the past Rifas has overestimated liner cargo projections. Donovan states that the instant forecast is also unduly optimistic because there was a large increase in trade over the seven trade routes involving European traffic between 1969 and 1973, consisting of 11.2[14] percent annual growth in United States imports and 10.2 percent annual

[14] Donovan's percentage of import growth differs from Rifas' 11.9 percent because Donovan uses slightly different data as derived from MarAd supplied census data (44A and 42A).

growth in exports. Donovan argues that if the 15-year period from 1958 had been chosen, this would have shown a 4.4 percent annual growth in United States imports and a 1.6 percent annual decline in exports. Moreover, the period from 1967 to 1973 would have shown a 5.1 percent annual growth in imports and a 3.1 percent annual growth in exports, while the period from 1968 to 1973 would have shown a 4.4 percent annual growth in imports and a 5.9 percent annual growth in exports.

Donovan also states that Rifas overlooked various factors which will tend to reduce liner traffic in the future between the United States and Europe. A capital shortage caused by continuing government deficits could tend to reduce international shipping. Shipping costs will rise in the future because of increases in petroleum prices. Governments may adopt restrictive trade practices in the future to curb imports. The amount of liner trade as a percentage of all oceanborne traffic has been falling. Air freight over the north Atlantic has increased rapidly in the past several years.

3. Comparative Analysis

While Waterman's Exhibit No. 22 does show that the amount of liner trade as a percentage of all oceanborne traffic has been falling, the tonnage data on liner trade has been increasing even if not in the same proportion to all oceanborne trade. There is insufficient evidence of record to substantiate that governments will adopt restrictive trade practices; that there will be a capital shortage; or that any rise in shipping costs in the future because of increases in petroleum prices will be greater than the general rate of inflation. The fact that the use of air freight over the North Atlantic has been increasing also has not been shown to be particularly relevant. That these factors may alter the forecast is not questioned. However, they are not reasonably predictable.

Sea-Land apparently concedes that there is a correlation between the gross national product of a nation and the monetary value of *total* imports, but it correctly argues that there has been less correlation in the past between gross national product and the amount of *liner* cargo moving on a

particular trade route. The correlation employed will, of course, improve when the various routes are combined. Rifas assumes, however, that the same relationship or percentage of trade on a particular trade route to the whole of the foreign trade will continue. This has not been firmly established but the method is acceptable in the short term, as used up to 1980, as a reasonable method. There are difficulties inherent in any cargo projection because of the interaction of numerous economic and political events which are impossible to predict. It is nevertheless necessary to forecast the future cargo pool in evaluating the adequacy of U.S.-flag service. Rifas made a reasonable attempt to do this. He has used a reasonable method which has not been proven to be without benefit.

Sea-Land also attacks the complicacy of the forecast. However, this does not make the forecast unusable. For simplicity, and comparison, the past tonnages figures in Table 1, supra, may be arrayed and a simple time-series trend line extrapolated to 1980 to give a quick cargo projection. This method would, of course, be attacked as being too elementary. Moreover, this method—as well as the method employed by Rifas—would produce different results depending upon what data and what periods are used. However, it does produce a readily available alternative forecast method which may be constructed from the record.[15]

Sea-Land asserts that the Rifas analysis which uses a five-year data period so placed as to begin the time series with a low year (1969) and to end with a high year (1973), overstates probable growth increase. This is well taken as it is axiomatic that methodology changes through an increased or decrease in a time span will produce somewhat different growth analysis results. Likewise, a constant time span applied to different intervals will produce different results. Although Rifas adjusted his figure downward to give a "conservative" forecast in order to closer approximate reality, the adjustment is arbitrary and may not be enough.

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[15] See Appendix B for methodology.

In analyzing the past average tonnage of liner cargo data, found in Table I, supra, it is apparent that in the 1969-1973 data period 1969 was the low year, or very close, and 1973 was the high year in virtually all instances. However, the use of 1968 and 1967 data shows that 1968 was higher than 1969 in all instances and that the extreme variation of the 1969-1973 data is somewhat reduced by inclusion of 1968 and 1967 as two additional data periods. The use of these periods will also add two more years to the time span in order to give a more reliable measure. It is not practical or wise to extend the time span back beyond 1967 because the more recent shipping periods will reflect better the shipping innovations that have come about.

By extrapolating a time-series trend line based on 1967-1973 data, a trend line data projection for 1974 is shown to be lower than the 1973 actual data or 1974 preliminary figures in virtually all instances. However, the 1974 preliminary figures are, in most instances, higher than the 1973 figures. The thrust of this is a conclusion that 1973 was apparently not so high as to be considered unusual, even though the 1973 data is generally above an extrapolated trend line. Likewise, the trend line on 1967-1973 data appears to be reasonable as the extrapolated 1974 figure is reasonably close to the preliminary 1974 data reported.

Having balanced somewhat the low effect of 1969 on a short-span trend and found 1973 not so unusually high as to be unusable, it is concluded that the time span from 1967-1973

provides a reasonable time period without such extreme variations as to be unusable. This information is shown as follows:

Comparison of Data for 1973 (Actual) and 1974 (Preliminary and Trend Line) (/000 LT)

	1973	1974			
	Actual	Preliminary	Trend-Line	Difference Prelim.-Trend	Average of Trend and Preliminary
T.R. 5					
imports	3,848	3,974	3,782	192	3,878
exports	2,698	3,371	2,566	805	2,968
T.R. 6					
imports	758	613	544	31	628
exports	314	391	252	139	322
T.R. 11					
imports	708	670	579	91	624
exports	838	995	739	256	867
T.R. 21					
imports	1,391	1,743	1,550	193	1,647
exports	2,233	2,212	1,985	227	2,098

Having reached this conclusion, a simple time-series trend line based on the 1969-1973 data, from Table I, supra, was extrapolated for each trade route to 1980—the year of forecast by Rifas.[16] The results are as follows:

Comparison of Forecast with Trend Line 1980 (/000 LT)

	Rifas Forecast	Trend Line Projection	Average
T.R. 5			
imports	4,876	4,799	4,837
exports	4,017	3,188	3,602
T.R. 6			
imports	1,049	514	782
exports	500	209	355
T.R. 11			
imports	877	614	746
exports	1,292	906	1,099
T.R. 21			
imports	1,797	2,343	2,070
exports	3,621	2,180	2,901

[16] It is recognized that the Subsidy Board has rejected complete reliance on a trend line because the trend line does not account for compound growth. Subsidized Service on Routes 29 and 17, 14 SRR 387, 401 (1973).

Whereas the trend line has given a lower value, this is not to say that it is more accurate. Indeed, the actual value could be above the forecast figure or below the trend-line figure. However, the idea advanced by Rifas that his forecast is "conservative" is rejected. In view of the foregoing analysis, an average of the Rifas forecast and the trend-line projection is hereby adopted as a better and more reasonable projection of future cargo which recognizes somewhat the problems of forecasting, the differences of data, the selectivity of a time span, the point of application, an optimistic approach, conservative approach, mathematical approach, and subjective approach. The data which is hereby adopted as the acceptable liner-cargo foreign-trade forecast for 1980 is as follows:

Adopted Liner-Cargo Foreign-Trade Forecast—1980
(/000 LT)

	Import	Export	Total
T.R. 5-7-8-9	4,837	3,602	8,439
T.R.6	782	355	1,137
T.R.11	746	1,096	1,842
T.R. 21	2,070	2,901	4,971

E. Capacity Allocation

Four U.S.-flag operators other than Waterman serve the Atlantic/Gulf-North Europe trade routes here involved. Some 27 vessels are employed and some 308 voyages were made in 1973.[17] An analysis of the capacity of these carriers to handle the present and projected cargo, with and without Waterman, was made by the same economic witnesses, Rifas and Donovan.

1. Manalytics—Rifas

In order to determine the U.S. vessel capacity to handle the projected cargo, Rifas listed the cargo handling capacity characteristics for the U.S.-flag vessels on the involved trade routes.

[17] Based on annualized data for 6 months of 1975.

An annual maximum capacity for each vessel was then derived by multiplying the estimated number of annual voyages for each vessel by the listed vessel capacity. The capacity was thus calculated separately for each of the components of container TEU's and non-container bale cube. The various capacity components were converted into measurement tons in order to provide a uniform measurement standard.[18]

The service patterns involve seaboards, combination of seaboards, coastwise and intercoastal feeder ships on U.S. and foreign coasts, rail service between ports (minibridge), rail service passing in transit through the U.S. (landbridge), domestic and international transportation by water, rail, truck, pipeline, or air to or from the ports of loading or unloading. Many operators run services on two or more trade routes, and it is necessary to allocate each carrier's vessel capacity for each route. The trade-route allocations correspond generally to the 1973 cargo carryings and particular vessel sailings. The measurement-ton capacity and trade-route allocations are shown as follows:

Measurement-Ton Capacity Allocation to T.R.

	Vessel Capacity	Percent to T.R.				Capacity MT to T.R.			
	(MT)	5-7-8-9	6	11	21	5-7-8-9	6	11	21
Sea-Land									
SL-7	2,728,440	100	—	—	—	2,728,440	—	—	—
SL-18	1,917,135	—	—	25	75	—	—	479,283	1,437,851
AEL									
Break Bulk	432,700	80	10	10	—	346,160	43,270	43,270	—
Container	1,480,820	90	—	10	—	1,332,738	—	148,082	—
USL	2,644,455	90	—	10	—	2,380,009	—	264,446	—
Lykes	1,040,900	—	—	—	100	—	—	—	1,040,900
						6,787,347	43,270	935,081	2,478,751

[18] One TEU equals 1,100 cubic feet and 40 cubic feet equals one mesurement ton. MT = TEU(1,100) ÷ 40.

The full measurement-ton capacity allocated above is a theoretical measure which is not realistically obtained. A stowage factor adjustment must be made to allow for loading and cargo characteristics which prevent the complete space (measurement-ton theoretical capacity) from being filled.

Waterman showed past measurement-ton and long-ton annual movements over the involved trade routes and the corresponding stowage factors calculated therefrom. This data was taken from census data (44A/42A), which is slightly different from the long-ton figures earlier adopted herein to show historical cargo movements. However, since the measurement-ton figure was also taken from the same census data source, the stowage factor thereby computed (MT/LT) would be applicable to another long-ton source figure because the stowage factor only shows a relationship between long tons and measurement tons, or how many long tons may be moved within the available space.

Average Stowage Factors of Liner Cargo

	Import		Export	
Trade Route	1973	1969-1973 Average	1973	1969-1973 Average
5-7-8-9	2.41	2.52	2.16	2.05
6	2.00	2.11	2.31	2.10
11	1.55	1.71	1.84	1.75
21	1.27	1.52	1.72	1.64

Although the vessel capacities will be equal in both directions the ratios of long tons to measurement tons will vary from trade route to trade route and from direction to direction. The dominant directions of cargo movement for 1973 are:

Trade Route	Direction	/000 LT
5-7-8-9	Inbound (import)	3,848 (N. Atlantic/N. Europe)
6	Inbound (import)	758 (N. Atlantic/Scan.)
11	Outbound (export)	838 (S. Atlantic/N. Europe)
21	Outbound (export)	2,233 (Gulf/N. Europe)

This dominant direction relationship will also continue in the cargo forecast for 1980.

Rifas makes a capacity allocation to determine what percentage of long tons of cargo can be handled by the operating U.S.-flag fleet on the dominant leg of each trade route. He first estimated an average load per TEU. This was done by taking long-ton and measurement-ton data for the cargo moved—grouped by density classification (contained in submitted data)—for each direction and trade route, calculating the number of weight limited containers and cube limited containers, then deriving an average load per container which was then converted to an equivalent average load per TEU. Each vessel's long-ton effective capacity for container operations could then be calculated by multiplying the average TEU load by the vessel number of TEU's capacity. Rifas further added a factor of 10 percent to account for broken stowage or air space. To derive his estimate of measurement tons, he used individual container stowage factors rather than vessel or trade route stowage factors. This figure is then asserted to be the vessel's effective capacity, or that LT capacity which the vessel could move under the weight and measure in the particular trade. After the vessel capacity was derived, an annual capacity was calculated by multiplying the individual vessel capacity by the number of planned sailings under the following schedule:

U.S. Lines—containerships—2 weekly voyages—104 annually

Sea-Land— (SL-7)—1 weekly voyage—52 annually

(SL-18)—1 weekly voyage—52 annually

AEL—containerships—1 weekly voyage—52 annually

combination—1 weekly voyage—52 annually

breakbulk—14 annually

Lykes—Seabee—28 annually

The overall maximum effective capacity was then reduced to allow for military cargo. This was done by converting military measurement tons to long toms based on an estimated

stowage factor of 20 percent. The 1980 projected maximum effective capacity under the Rifas analysis was shown as:

1980 Maximum Effective Capacity Without Waterman (/000 LT)

Trade Route	Total Imports	Commercial
5-7-8-9	2,042	1,973
6	10	10
11	332	332
21	1,347	1,297
	Exports	
5-7-8-9	2,281	1,745
6	8	8
11	343	343
21	1,165	1,035

Comparing the projected cargo capacity to his 1980 cargo projection, supra, Rifas concludes that the U.S.-flag fleet, without Waterman could not handle 50 percent of the cargo on the dominant legs of the involved trade routes. His figures show a capability to handle 40 percent on T.R. 5-7-8-9; 1 percent on T.R. 6; 27 percent on T.R. 11; and 29 percent on T.R. 21. However, by substituting the cargo projection figures and the 1973 cargo data adopted herein,[19] the following relationship would be shown:

Trade Route	Rifas' Projected Maximum Effective Capacity (/000)	Cargo (/000 LT)		Percent	
		1973	1980	1973	1980
5-7-8-9	1,973	3,848	4,837	51	41
6	10	758	782	1	1
11	343	838	1,096	41	31
21	1,035	2,233	2,901	46	36

2. Booz, Allen & Hamilton—Donovan

Donovan's analysis of the U.S.-flag capacity is limited to T.R.'s 5-7-8-9 and 21. Donovan allocated various vessels or

[19] Table I, page 23, and page 36.

percentages of vessel capacities to the trade routes in the same manner as Rifas. He also converted the capacity into a measurement-ton figure using a factor of 1,100 cubic feet per TEU and dividing by 40 cubic feet for each measurement ton. However, the capacity figure derived was reduced to show an expected or planned utilization of 90 pecent. The 90 percent capacity utilization figure, in measurement tons per vessel on or allocated to the trade route, was multiplied by the number of voyages to show an annual capacity, in measurement tons, on the trade route, at 90 percent utilization. The annual capacity figures thus derived were totalled to show U.S.-flag capacity. The capacity thus derived was then reduced by an allowance for military cargo on the dominant leg. The military cargo figure was taken from the Rifas data.

Donovan thus arrives at a projected capacity for the U.S.-flag fleet of 5,931,217 MT on T.R. 5-7-8-9. Donovan then adopted an average stowage factor of 2.52 measurement tons to long tons taken from Rifas' data for total trade route, by direction, measurement ton to long ton relationship for 1969-1973. The stowage factor was then applied to 1974 preliminary MarAd figures in long tons (3,666,762) to convert to measurement tons of cargo at 9,240,240. Donovan concludes that the previously calculated capacity, of 5,931,217 MT, at 90 percent utilization, could have handled 64 percent of this cargo.

By substituting the 1973 cargo figure of 3,848,000 LT adopted herein, and using Donovan's method, 9,696,960 MT would have been available. The U.S.-flag capability would have been able to handle 61 percent of the liner cargo, inbound, on T.R. 5-7-8-9.

Using the same ratio of measurement tons to long tons and applying it to the Rifas import tonnage forecast for 1980 of 4,876,000 long tons for T.R. 5-7-8-9, Donovan projects the anticipated cargo demand to be 12.3 million MT in 1980. Using the same methodology and applying it to the cargo forecast of 4,837,000 LT, adopted herein, the anticipated demand would be projected to 12.2 million MT. When compared to the current capacity, the U.S.-flag carriers, without

Waterman, when operating at 90 percent utilization could handle 49 percent of the cargo inbound on the trade route. Donovan, however, projects a greater capacity based on the use of three SL-7's operating at an increased speed to offer 26 voyages per year per vessel or 7.3 million MT. This would produce a capability of handling 59 percent of the T.R. 5-7-8-9 inbound cargo in U.S.-flag vessels at a 90 percent utilization rate without Waterman.

In his analysis of T.R. 21, Donovan again allocated vessel capacities at same percentage as Rifas. Again using a 90 percent utilization rate and after reserving 136,757 MT[20] for military cargo, a current measurement ton capacity for U.S.-flag vessels, without Waterman, was calculated to be 2,324,533 MT.

Donovan then applied a stowage factor of 1.64 measurement tons to long tons taken from Rifas' data for total trade route, by direction, measurement ton to long ton relationship for 1969-1973. The stowage factor was then applied to 1974 preliminary MarAd figures of 2,310,388 LT export for T.R. 21, and a measurement ton figure of 3,789,036 MT was derived. The previously calculated capacity of 2,324,533 MT, at 90 percent utilization could have handled 61 percent of this cargo.

By subsituting the 1973 cargo figure of 2,233,000 LT adopted herein, and using Donovan's method, 3,662,120 MT would have been available. The U.S.-flag capability would have been able to handle 63 percent of the liner cargo, outbound, on T.R. 21.

Using the same ratio of measurement tons to long tons (1.64) and applying it to the Rifas export tonnage forecast for 1980 of 2,621,000 LT for T.R. 21 Donovan projects the anticipated cargo pool to be 5.94 million MT in 1980. But using the same methodology and applying it to the cargo forecast adopted herein of 2,901,000 LT, the anticipated demand would be projected to 4.76 million MT. When compared to the current capacity of 2,324,533 MT, the U.S.-flag carriers without Waterman, when operating at 90 percent utilization could

[20] Taken from Rifas' data.

handle 49 percent of the cargo outbound on the trade route. Donovan, however, projects a greater capacity based upon an increase of 60 round trips per year by Sea-Land's SL-18 vessels. He thus projects the 1980 U.S.-flag capacity to be 3.05 million MT. This would produce a capability of handling 64 percent of the T.R. 21 outbound cargo in U.S.-flag vessels at a 90 percent utilization rate without Waterman.

3. Capacity Analysis

The data and statistical projection methodology submitted by the parties has been previously stated. However, an analysis is here taken to establish the factual data and methodology employed by the administrative law judge in reaching data conclusions and a factual base to be employed in the decision.

The analysis and adoption of certain data was previously done to establish cargo data figures to be used herein. It is now necessary to consider the U.S.-flag fleet's capacity or ability to handle the prognosticated cargo.

Sea-Land argues that the concept used by Rifas of analyzing the present U.S.-flag capacity is not proper. This objection is rejected. Indeed the best projection is that capacity which is currently on stream and scheduled.

Basically, the economic analysis has centered around the idea of analyzing a space requirement (measurement tons) for handling available cargo whereas in most past cases the analysis has centered around weight alone. The use of measurement tons shows that U.S.-flag vessels do not have as much available capacity as it would appear if only weight tons were considered. This concept is preferred and gives a better picture of the U.S.-flag vessel adequacy.

From this central theme, Rifas analyzes the U.S.-flag vessels' present capacity to handle present and future traffic. Sea-Land argues that increased vessel capacities should be considered against forecasted future cargo. A theoretical vessel capacity increase derived largely by "paper" speed (knots) increases is not acceptable. The future target date is close enough that any vessel increases would be known at this time. The future date is not required to be of a fixed point within a

given number of future years to satisfy the requirements of the Act. A point in time five to seven years beyond the available data allows a forecast not too far distant as to be unduly affected by political and technological innovations. At the same time it allows for an administrative delay so that the final decision is still within the time frame of the projection.

Inasmuch as the supply of vessel capacity is expected to respond to the demand for such space, it is proper to consider that today's presently planned vessels and schedules will be maintained, with close proximity, up to the date of forecast. A theoretical increase in capacity based on additional sailings at higher vessel speeds should not be considered without firm data that the schedule is indeed being changed. Even if additional sailings could be made by an existing carrier there is no reason why the existing carrier could not maintain its existing schedule and allow an applicant to perform the additional sailing in additional vessels. This would permit an elastic capacity for short-term emergencies rather than planning for a future with capacity stretched to its fullest extent. Therefore, the concept of comparing measure or space capacities using presently known U.S.-flag vessels and operations against projected future tonnages within a five to seven year period is allowable and will satisfy the requirements of the Act.

The statistical methodology employed by the parties has some basic differences. Sea-Land argues that the Rifas method is too complicated for use in this proceeding. This point is well taken. Complicacy in and of itself is not objectionable. However, Rifas has gone through a very involved and complicated procedure wherein it appears that unexplained "conservative" factors are sometimes added and that a particular vessel's container experience is analyzed, and that experience is then projected to the total trade rather than focusing on the total trade experience as it may apply to a carrier's operations. This is not to say that the Rifas method is incorrect, but the Donovan method appears better suited for the purposes of this proceeding and understanding. The basic methodology of projecting capacity as employed by Donovan will therefore be used subject to certain differences herein explained.

4. Adopted Method of Capacity Allocation

a. *Principles*

The methodology here used will be to compare the U.S.-flag capacity with the projected tonnage to determine if the U.S.-flag capacity is sufficient to carry a substantial portion of U.S./foreign waterborne commerce on any trade route involved. To do this, first annual vessel capacities will be derived. This will be done by (a) listing the vessels or class of vessels in capacity measures,[21] (b) multiplying the number of projected annual voyages for all vessels in the class to ascertain projected annual capacities by vessel or class,[22] (c) converting the projected annual vessel capacities to a common measure in measurement tons by using the same factors as used by the parties,[23] (d) calculating the annual MT capacity.

Second, the annual measurement tons of vessel capacity will be allocated, in a percentage, to a particular trade route according to a past ratio of cargo carried.[24]

Third, a maximum effective capacity to handle weight tons (long tons) on a particular trade route within the measurement tonnage allocated to the trade route, by vessel, will be calculated by (a) determining applicable stowage factors,[25] and (b) dividing the measurement tons (by trade route allocation) by the stowage factor of the class of vessel, on the trade route, in the dominant direction.[26]

Fourth, the expected carriage, in long tons, at a low capacity utilization will be calculated by reducing the maximum effective long-ton capacity by a utilization factor to show the minimum weight-tonnage that can be expected to move with the U.S.-flag capacity. The purpose of this operation will be to adopt a percentage of vessel utilization which must be maintained for U.S.-flag vessels for continued operation. It will then

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[21] Appendix C, working papers column (1), (2), and (3).

[22] *Id.*, column (5), (6), and (7).

[23] MT TEU = TEU 1,100 + 40 cu. ft., MT Break Bulk — cu ft. + 40, Appendix C, working papers column (8) and (9).

[24] Appendix C, working papers column (10) and (11).

[25] *Id.* column (12).

[26] *Id.* column (13).

show how much, in long tons, the percent U.S.-flag vessels could carry when operating at very poor utilization conditions.[27]

Fifth, a figure will then be derived to show what percentage of projected trade-route tonnage can be handled by U.S.-flag carriers without Waterman[28] by (a) taking the projected long tons adopted in an earlier section[29] and (b) dividing the anticipated minimum long-ton tonnage which the U.S.-flag fleet could carry and still continue operations (degree of overtonnaging) by the projected long tons,[30] by trade route, in the dominant direction.

Sixth, a figure will then be derived to show what percentage of tonnage can be handled with Waterman,[31] by (a) adding the projected maximum Waterman capacity[32] and (b) dividing again by the long-ton cargo projection.

b. *Source Selection and Operation of Data*

The methodology or source of data used in the working papers, Appendix B, is hereafter explained.

(1) *annual vessel capacities*

(a) Vessel capacities (working papers col. (1), (2), and (3)) USL operates eight containerships of the Leader class on the involved routes. The exhibits taken from discovery data show the TEU capacity show this class of vessel as being 1,009 TEU's while Rifas and Donovan used a 1,023 TEU figure. The 1,009 TEU figure based on discovery data (SL-32) and Waterman's requested finding is considered more accurate and will be used.

AEL has five containership vessels of the Stag Hound class which appear to have made voyages. The TEU capacity is given as 1,070 TEU's in discovery data (SL-33) while Rifas used a 1,076 TEU figure as did Donovan.

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[27] *Id.* column (14).
[28] *Id.* column (17).
[29] *Supra,* page 46.
[30] Appendix C, working papers column (15) and (16).
[31] *Id.* column (19).
[32] *Id.* column (18).

Moreover, Donavan only credited AEL with three vessels of this class. AEL also operates two container vessels which, on the same basis, appear to have a capacity for 834 TEU's instead of 810 TEU's. Finally, AEL also operates two breakbulk vessels, which are accepted as being approximately 562,000 cubic feet in capacity.

Sea-Land operates three SL-7's with a capacity of 2,067 TEU's each. It also operates four SL-18's. Two of the SL-18's are of the Consumer class, with 1,400 TEU capacity each, and two are of the Economy class, with 1,389 TEU capacity each.

Lykes operates three barge carrying vessels, with a bale cubic capacity of 1,487,000 cubic feet each.

The cargo deadweight capacities estimated by Rifas for all vessels is accepted. (column (3)).

(b) *voyages. (col. (14))*

The USL scheduled pattern of two weekly voyages is likely to continue. This is somewhat higher than the annualized voyage figure of Rifas or Donovan's projected 85 voyages. AEL's annualized figures will be used. This shows 38 containership voyages, 16 combination ship voyages, and 14 breakbulk voyages. This appears larger than the Rifas figure using one weekly containership and combination ship voyage or the Donovan figure of 42 projected voyages with only three vessels. For Sea-Land, a weekly sailing, 52 annually, is projected for the SL-7's as a group as well as a weekly sailing for the SL-18's. Although Sea-Land now has three SL-7's instead of two, and although the vessels have the speed capability to make many more voyages, the evidence is insufficient or unconvincing to establish that Sea-Land is indeed going to shift its operating pattern and expend additional fuel with the higher speeds. For consideration here, theoretical operations with maximum potential are not used. The voyage finding is based on record practicalities.

(c)(d) conversion and calculations. (col. (5), (6), (7), (8), and (9)) The vessel capacities multiplied by the

projected number of voyages gives an annual capacity figure. Measurement-ton capacities are calculated using the formula adopted, supra.

(2) *allocations of capacities.* (col. (10) and (11))

The allocation of capacities to a particular trade route is made based on a carrier's percentage of tonnage handled by vessel by trade route. Although different vessel capacities and voyages are assigned, the parties are in general agreement, with slight differences previously discussed, as to the percentage of capacity to be assigned to a trade route. These percentages are as follows.

Percent to T.R. (col. (10))

	~~5-7-8-9~~	6	11	21
USL	90	—	10	—
AEL				
Breakbulk	80	10	10	—
Container	90	—	10	—
Sea-Land				
SL-7	100	—	—	—
SL-18	—	—	25	75
Lykes	—	—	—	100

By multiplying the percentage allocation by each carrier's annual measurement-ton capacity for a particular

vessel or class of vessels, the measurement tons allocated to the trade route is derived and shown as:

Annual MT Allocated to T.R. by Vessels (col. (11)) (/000)

Carrier/Vessel or Class	5-7-8-9	6	11	21
USL				
container	2,697	—	300	—
AEL				
Stag Hound				
container	1,006	—	112	—
Young America				
container	330	—	37	—
breakbulk	189	24	24	—
Exford				
breakbulk	158	20	20	—
Sea-Land				
SL-7				
container	2,956	—	—	—
SL-18				
container	—	—	498	1,496
Lykes				
breakbulk	—	—	—	1,041

The measurement-ton capacity allocations must be considered in analyzing each trade route in the dominant direction. The dominant direction of trade, by long tons, is:

Trade Route	Direction
5-7-8-9	Inbound (import)
6	Inbound (import)
11	Outbound (export)
21	Outbound (export)

(3) *maximum effective capacity*

(a) stowage factors. (col. (12))

Inasmuch as there is space lost and occupied space is filled before the vessel weight limit is reached, it is necessary to find how many long tons may be transported within an allocated measurement-ton capacity. The

relationship of measurement tons to long tons is here expressed as a stowage factor. The stowage factor differs for each trade route and each direction according to the trade or cargo carried. A ratio of 1.00 would indicate that for each measurement-ton space, one long ton in weight could be carried. As the commodities become lighter, bulkier, or less dense, less than one long ton could be carried in that space and the stowage factor would increase (e.g., 1.41; 2.32; etc.). If the commodities were heavier or more dense, the stowage factor would decrease (e.g., 0.91; 0.80; etc.).

An anomaly to this concept exists, however, when the method of transport is considered. For instance, in a very dense-commodity trade a low stowage factor would be expected; and indeed it would so appear in a breakbulk vessel which is able to utilize all of its cargo space according to the dictates of the cargo loaded.

On the other hand, the stowage factor for the same cargo when transported in a containership could rise because each container has its own weight limitation. Thus, when a dense commodity is loaded, the container weight limitation may be reached with space still present but unavailable because the full container may be a single commodity to a single consignee without being able to utilize all space by mixing light and dense cargoes in the same container. In that instance, the individual container stowage factor would be high, and, as projected for the entire vessel, the containership stowage factor would be much higher than a breakbulk vessel under the same conditions.

For these reasons, it is necessary to determine the long tons that could be carried within the allocated measurement tons by type of vessel. This is accomplished by dividing the measurement tons allocated to a particular trade route by the stowage factor for that trade route, by direction, by type of vessel.

Donovan did not do this. He used a stowage factor figure average for *all* vessels on a particular trade route, by dominant direction, from 1969-1973, taken from Rifas'

material. These figures were 2.52 for T.R. 5-7-8-9 and 1.64 for T.R. 21.[33] The incorrectness of this "all vessel" figure (i.e., trade-route average) is apparent when the measurement-ton capacity of an SL-18 on T.R. 21 (38,500 MT) is divided by the 1.64 figure to show a long-ton capacity of 23,476 LT when the rated capacity is only 14,846 LT. However, when a stowage factor [34] of 2.83 for *containerized* cargo on the same route is applied, the resulting long tons carried would be 13,509 which is well within the estimated long-ton capacity.

Rifas[35] employed breakbulk vessel stowage factors, but "adjusted" them. For low-density commodities (light and bulky, higher stowage factor), the breakbulk *commodity* stowage factor[36] was increased by ten percent. This figure is unsupported. For high density (heavy, low stowage factor), a minimum container stowage factor, obtained by dividing the container measurement-ton capacity by the container weight limitation, was applied to any commodity which had a breakbulk stowage factor lower than the container minimum stowage factor.

Rifas' container examination, projection, and adjustment is not here acceptable. There are arbitrary adjustments and the system does not readily lend itself to overall trade analysis. On the other hand, Donovan's trade analysis is acceptable on methodology, but the stowage factors used do not readily apply to the vessels on the trade route.

Inasmuch as the U.S.-flag vessels' capacities are being considered, a stowage factor based on the U.S.-flag experience should be used. Moreover the stowage factor should be derived from the applied to similar methods of transport. For these reasons, the stowage factors postulated by Rifas at p. II-9, Exhibit WS-5, are not appropriate for containership capacity allocations because they are based on Waterman's Mariner or breakbulk experience.

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[33] Even these figures would be changed under Donovan's methodology if the LT cargo data, as herein found, were substituted for Rifas' LT cargo data.

[34] Discussed infra.

[35] Rifas was analyzing container loadings rather than vessel types.

[36] Not trade route or vessel type stowage factor.

The stowage factor to be applied to U.S.-flag containership operations should be based on U.S.-flag containership operations. This figure may be obtained from data in MarAd official publications of Containerized Cargo Statistics for 1973 and 1974. Excerpts from the 1973 publication are in Exhibit SL-4 and official notice is taken of the 1974 publication. The stowage factors here assigned are based on an average of the stowage factors for each trade route, by directions, for containerized U.S.-flag cargo, for 1970-1973. These figures are:

T.R. 5-7-8-9 (inbound)	2.81
T.R. 6 (inbound)	No data
T.R. 11 (outbound)	3.08
T.R. 21 (outbound)	2.83

These stowage factors are derived as follows:

Average Stowage Factors 1970-1973
(/000)

T.R. 5-7-8-9 (Inbound)

U.S.-flag Container Cargo

Year	Cubic Feet(a)	MT(b)	LT(a)	Stowage Factor(c)
1973	187,199	4,680	1,528	3.06
1972	136,252	3,906	1,111	3.07
1971	102,324	2,558	974	2.63
1970	113,422	2,836	1,137	2.49

Average Stowage Factor	
1970-73	2.81

T.R. 6 (Inbound)
No Data on U.S.-flag Experience, but there is no U.S. Container Capacity Allocated

T.R. 11 (Outbound)

	Cube Feet(d)			MT(b)	LT(d)			
Year	All Flag	% U.S.	U.S.		All Flag	% U.S.	U.S.	Stowage(c) Factor
1973	52,359	23	12,045	301	432	28	121	2.49
1972	28,838	15	4,326	108	234	12	28	3.86
1971	11,570	28	3,240	81	93	30	28	2.89
1970	(data insignificant)							

Average Stowage Factor	
1970-73	3.08

T.R. 21 (Outbound)

Year	Cube Feet(e) All Flag	%U.S.	U.S.	MT(b)	All Flag	%U.S.	U.S.	Stowage(c) Factor
1973	52,430	62	34,987	875	483	64	309	2.83
1972								
1971	(U.S. percentage unavailable for 1970-1972)							
1970								

Average Stowage Factor
2.83

(b) Cu. Ft. ÷ 40
(c) MT ÷ LT
(e) SL-4, p.8

The stowage factors to be applied to the breakbulk operations, likewise, should not be inflated by containership experiences or foreign flag experiences. An average of the Waterman data will be used in application to the breakbulk capacity allocation of the trade route. Even though the Lykes' vessels represent a somewhat different mode of cargo handling which might show a different stowage factor characteristic, there is no evidence here to support such a conclusion. On the contrary, it appears that the barge method would be more characteristic of the breakbulk method. Moreover, the minimum stowage factor for Lykes' vessels, based on record data, would be 1.18. This compares favorably with the Waterman breakbulk figure of 1.65 for T.R. 21 exports average 1970-1973 where Lykes is involved. Accordingly, the average stowage factors for 1970-1973 breakbulk or barge operations by trade route, by direction are established as:[37]

T.R. 5-7-8-9 (inbound)	2.52
T.R. 6 (inbound)	2.11
T.R. 11 (outbound)	1.77
T.R. 21 (outbound)	1.65

(b) calculation. (col. (13))

By dividing the measurement tons previously allocated to a trade route by the stowage factor applicable to the trade route for the method of transport and by then adding the individual vessel capacities, a figure is derived to show the maximum long tons of cargo that could be

[37] WS-5, p. II-9.

handled on the trade route, by direction, with the U.S.-flag capacity available without Waterman. These figures are:

(/000)

T.R. 5-7-8-9 (inbound)	2,625 LT
T.R. 6 (inbound)	21 LT
T.R. 11 (outbound)	332 LT
T.R. 21 (outbound)	1,159 LT

(4) *expected carriage at low utilization.* (col. (14))

The expected long-ton capacity is simply a minimum that U.S.-flag vessels can be expected to utilize. Sea-Land speaks of operations at 90 percent utilization and the figures thus far calculated are at 100 percent utilization. Naturally, a steamship operator would desire a high utilization in order to increase profits. However, insofar as gaining cargo within the objective of handling 50 percent of the U.S. long tons of cargo in the dominant direction of the trade route, there should not be any prohibition against a subsidy until there is enough U.S.-flag capacity on the trade route to handle 50 percent of the tonnage at close to a "break even" point. Therefore, instead of viewing this application from a position of what tonnages the U.S.-flag carriers could handle at a high utilization (undertonnage), the application should be viewed as what tonnage the U.S.-flag carriers could handle at an under utilization or overtonnaged situation. Stated another way, at what poor utilization figure can U.S.-flag carriers be expected to continue operations and compete for cargo?

Most utilization figures are in the 80 percent range. However, it has been stated somewhat generally that a figure closer to 70 percent would allow a carrier to "break even". A vessel would not normally move in a dominant direction without a minimum of 70 percent utilization. Even at 75 percent there is some question as to whether a voyage would be undertaken. This, then, is established as an overtonnage point—a point at which the carrier will still be expected to operate and compete for traffic. If the

utilization figure drops below the 75 percent level, it would be expected that the more marginal operators would reduce the capacity available (by reducing voyages) until the utilization figure rose.

By reducing the maximum long-ton capacity to that which may be carried at 75 percent utilization, or taking 75 percent of the maximum long-ton capacity, a figure is derived to show a minimum of long tons that can or should be carried on the trade routes by U.S.-flag carriers. That is, the amount of cargo that can be handled even if trade conditions were so poor that a vessel had to be operated at a very low utilization. These figures are:

(/000 LT)

T.R. 5-7-8-9	1,969 LT
T.R. 6	16 LT
T.R. 11	249 LT
T.R. 21	869 LT

(5) *U.S.-flag capability without Waterman.* (col. (17))

(a) cargo projections (col. (15) and (16))

The projected cargo earlier adopted is:

Trade Route	1973	1980
	(/000 LT)	
5-7-8-9 (inbound)	3,848	4,837
6 (inbound)	758	782
11 (outbound)	838	1,096
21 (outbound)	2,233	2,901

(pp. 23, 36 and 42)

(b) calculations. (col. (17))

The capability of the U.S.-flag fleet, in poor operating conditions, may now be analyzed by dividing the above-

determined poor condition or maximum overtonnage situation used capacity by the projected tonnage on the trade route. This shows that without Waterman, in 1973 the U.S.-flag fleet would not have been able to reach the 50 percent goal except over T.R. 5-7-8-9 under poor (overtonnaged) operating conditions. For 1980, the U.S.-flag fleet would not be able to meet its goal on any of the routes if required to sail under poor conditions.

The percentage of U.S.-flag capability without Waterman is shown as:

Trade Route	Dominant Direction	1973	1974
		percent	
5-7-8-9	inbound	51	41
6	inbound	2	2
11	outbound	30	23
21	outbound	39	30

(6) *U.S.-flag capability with Waterman*

(a) Waterman's capacity. (col. (18))

The maximum effective Ro/Ro capacity for 1980 as projected by Waterman is equivalent to the vessels' maximum cargo deadweight in long tons. The capacity for each trade route is shown as:

Waterman's Ro/Ro capacity
(/000)

T.R. 5-7-8-9 inbound	T.R. 6 inbound	T.R. 11 outbound	T.R. 21 outbound
200.2	46.2	770	231.0

(b) calculations. (col. (19))

By adding Waterman's Ro/Ro capacity, which is greater than the Mariner capacity, to the capacity previously ascertained for the U.S.-flag carriers (col. (14))

and by dividing the figure by the cargo projection, a U.S.-flag capability with Waterman's proposed operations is shown as:

Percent of Liner Cargo

Trade Route	1973	1980
5-7-8-9 (inbound)	56	45
6 (inbound)	6	8
11 (inbound)	39	30
21 (inbound)	49	38

III. DISCUSSION AND CONCLUSIONS

A. Preliminary Matters

Both applicant and Sea-Land made determinative motions at the hearing. Applicant sought a summary disposition favorable to its position while Sea-Land argued that the scope of service and number of sailings should be reduced or restricted. The motions, as such, are not renewed on brief but the substance of each is argued.

The summary disposition cannot be granted. The case is too involved and complex for solution in a summary disposition in the manner of a simple, slogan solution for a complex problem.

Likewise, Sea-Land's two part motion to (1) reduce the number of proposed sailings and (2) restrict service on T.R.'s 6 and 11 to privilege-call operations cannot be granted out-of-hand. The matters which Sea-Land would have the administrative law judge decide are, to most intents and purposes, beyond the issues of this hearing. There is a perplexing dichotomy between the ultimate issue under Title VI of the Act as to whether and to what extent ODS aid will be granted, on the one hand, and, on the other, the hearing issues under Section 605(c) of the Act. The hearing issues under 605(c)

relate to a question of adequacy of U.S.-flag service and/or the effect that a subsidy to applicant would have upon U.S.-flag operators. The real issues as to a need for and amount of subsidy or the contractual terms of the subsidy agreement under Section 601 of the Act are determined administratively without the benefit of an adversary hearing after the question of adequacy and/or effect is determined.[38]

The administrative law judge is not properly authorized to issue a finding which would affect, alter, or modify the proposed itinerary except to the extent that some modification would be necessary to avoid the bar of Section 605(c). The primary function of the hearing under Section 605(c) is to test the trade condition of a route by determining present and prospective adequacy of U.S.-flag service without applicant's proposed operation and then determining the adequacy of U.S.-flag service with applicant's operation.[39]

The service proposed *may* be considered and reduced hereonly to the extent that approval of the proposal in its entirety would exceed the standards of adequacy. If the U.S.-flag service—including that proposed—would still be inadequate, the service proposed could only be modified if there is a subsidiary finding that conducting the operation as proposed would not further the purpose and policy of the Act. This relates not only to the number of sailings but also to the voyage itineraries and the nature of the service.[40]

Therefore, specific findings are not made at this point out of context. The authorities cited in argument on this point have been considered and found unpersuasive for the propositions advanced. The decision will consider, first, the adequacy of U.S.-flag service without and with the service as proposed and, second, whether the service proposed will further the purposes and policy of the Act.

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[38] Cf. Subsidized Service on Routes 29 and 17, 14 SRR 387, 413-414 (1973), ____ MSB ____; and AEIL—Calls at Canary Islands, 2 MSB 100, 102 [6 SRR 76] (1965).

[39] Lykes Bros. Steamship Co., 2 MSB 57, 65-66 [7 SRR 643] (1966).

[40] Cf. American Export Lines, Inc.—Subsidy Reinstatement, 14 SRR 1539, 1549 (1975).

As a second preliminary matter, Sea-Land argues rather extensively on the basic proposition that the burden of proof in this proceeding lies with Waterman. This is basically correct. However, a finding as to whether applicant has sustained its burden is a factual issue to be determined.

B. 605(c) ISSUES

The issues for hearing under Section 605(c) of the Act, as set by the Maritime Subsidy Board in its notice, are identified as:

> 1. Whether the application is one with respect to a vessel or vessels to be operated in an essential service served by citizens of the United States which would be in addition to the existing service, or services, and if so:
>
> (i) Whether the service already provided by vessels of United States registry on such essential service is inadequate, and
>
> (ii) Whether in the accomplishment of the purpose and policy of the Act additional vessels should be operated thereon;
>
> 2. And if not in addition to the existing service; or services,
>
> (i) Whether the effect of granting the application would be to give undue advantage or be unduly prejudicial, as between citizens of the United States in the operation of vessels in such essential service, and if so,
>
> (ii) Whether it is necessary to enter into such contract in order to provide adequate service by vessels of United States registry.

Section 605(c) is divided into two clauses. The first governs applications for subsidy on a service which would be an addition to the existing service or services while the second clause governs applications for existing operations. The two

clauses are treated as being mutually exclusive in their application. That is, the satisfaction of an applicant's burden of proof under either clause is sufficient to avoid a finding that Section 605(c) is a bar to any further consideration of the application by the Subsidy Board.[41]

Under an existing operation analysis, it is sometimes not necessary to consider the adequacy issue. Although Waterman contends that a portion of the proposed operations is an existing service, it does not contend that the entire operation is an existing service. Thus, there is a necessity to analyze the adequacy issue because, to some extent, each of the service proposals involve additional operations. If a finding of inadequacy is sustained under the first clause—additional service consideration—further consideration of the existing—operation issue under clause under clause two is immaterial.[42] Therefore, the proposed services will first be considered as an additional service pro-proposal.

1. U.S.-flag Adequacy

In considering Section 605(c) adequacy of U.S.-flag service, it is necessary to consider adequacy from both a quantitative and qualitative view. The quantitative matters involve comparisons of data and statistical and mathematical projection in the abstract. The qualitative aspect goes to matters not mathematical but to such things as the type or character of service.

In examining the quantitative data certain basic procedures have evolved that will be applied unless sufficient reason is shown to modify or vary the normally accepted procedural approach. First, it is established that in two-way route operation, the data analyzed will pertain only to traffic moving in the dominant or heavy cargo direction. For the routes involved,

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[41] American Export Lines, Subsidy—Reinstatement, *supra* at 1545 and cases cited therein. It is noted that Sea-Land still disagrees with this interpretation. However, there is no need to consider Sea-Land's position, which is well stated in the AEL proceeding, in view of the clear interpretation given to Section 605(c) at this time.

[42] Lykes Bros. Steamship Co., *supra* at 63.

T.R.'s 5-7-8-9 and 6 are heavier inbound while T.R.'s 21 and 11 are heavier outbound. Second, each operation must stand on its own. The adequacy of U.S.-flag service on each trade route is examined separately to the extent that the proposal does not combine operations. Third, the data should include only relevant cargo which has been defined as the cargo which past experience indicates would be available or which as a practical matter can reasonably be expected to be carried by U.S.-flag carriers.

The quantitative standard for adequacy is not set out in the Act. However, Section 101 declares as a policy of the Act a necessity that this country shall have a merchant marine which is sufficient to carry a "substantial portion" of its waterborne foreign commerce. This policy must apply throughout the Act and thus any standard of "adequacy" would have to comport with the term of "substantial portion." In measuring or quantifying "substantial portion" and, in turn, "adequacy", the legislative history and early cases established these terms to mean a standard of 50 percent consistent with the realities of each of the particular trade routes under examination.[43]

Under this standard the earlier cases decided the adequacy issue quite easily by measuring the past percentage of total trade-route cargo carried by U.S.-flag vessels. In later developments an interest was expressed in over-tonnaging or vessel utilization. In the more recent cases the Subsidy Board has shown an interest in an analytical measure of adequacy that combines or considers vessel weight and space capacity and the expected amount of tonnage that may be carried. It is not enough to simply compare the vessel cargo deadweight tonnage with the total cargo expected to move on a trade route. In a recent decision which also involved Waterman, the Subsidy Board stated:

> "Whether or not these trade routes are cubic or weight in character, Waterman is conceptually correct that weight capacities can only be credited to the extent they have been and will likely be utilized. The

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[43] Bloomfield SS Co.—Subsidy, Routes 13(1) and 21(5), 4 FMB 349, 352-53, reargument, (1953).

> determination of inadequacy is concerned not with the theoretical maximum tonnage on the routes in 1980, but rather with the maximum tonnage that U.S.-flag operators can reasonably be expected to employ. Under Section 101 of the Act, our goal is to have a U.S.-flag fleet actually carrying a substantial portion of the U.S. foreign commerce and not merely having equal tonnage with foreign-flag competitors. Therefore, it is necessary to determine the percentage of the total weight capacity of U.S.-flag ships that may reasonably be expected to be engaged in carrying cargo, which percentage is usually expressed as the 'utilization factor.'
>
> "The record indicates that a utilization factor of 90% outbound and 60% inbound on TR 22, and 75% outbound and 70% inbound on TR 12 would reflect a slightly greater experience than U.S.-flag operators as a whole achieved on these routes. Therefore, after all other adjustments are made to the lift capacity figures on these routes, an adjustment must be made for weight utilization not reasonably expected to be achieved, by applying these utilization factors." (references omitted) Docket Nos S-336 and S-390, Waterman Steamship Corporation—Subsidy T.R. 12 and 22, 16 SRR 1357. 1376-1377(1976), ____MSB ____

In keeping with this approach, the administrative law judge recognizes that while the subsidy program has an objective to aid U.S.-flag carriers in efforts to obtain 50 percent of the U.S. waterborne foreign trade, the primary purpose of Section 605(c) is to prevent overtonnaging a trade route. Overtonnaging is roughly defined as having more vessel capacity available than needed for the available cargo. Indiscriminate subsidies must be avoided or reduced. However, the degree of overtonnaging on any trade route must be with reference *only* to U.S.-flag capacity. If foreign-flag capacity is recognized, this in effect would mean that the U.S. would withdraw or withhold its aid when foreign-flag carriers increase capacity on a trade route. This would allow any foreign nationally supported and

maintained merchant marine to control or limit U.S. competition simply by adding more of its own vessel capacity to the route. By the same token, it is improper to consider theoretical capacities predicated upon a vessel's highest design or rated speed. It may be well within the design capability of a vessel to operate at very high speeds and make more voyages. However, the administrative law judge will consider only those voyages shown to be within a probable, practical scheduling based on past practices or a very firm commitment to a reasonable future modification. To do otherwise would allow a U.S.-flag carrier to effectively control the size and competition of the U.S. fleet simply by operating high design-speed vessels on the route even if such vessels were not in fact being operated at the design speed.

Extending the overtonnage concept a bit further, there is a question as to how much utilization is expected of a vessel. When there is more capacity than tonnage available, a vessel will not be fully utilized. There will be empty space. Even when the vessel is fully loaded, there may be some space available even though it could not be used. Therefore, 100 percent or full utilization is theoretical and seldom, if ever, found. The degree or percentage of utilization then becomes the standard or measure of overtonnaging. However, if the Subsidy Board is only willing to aid a vessel with a high utilization, it is again allowing foreign competitors to fill the trade route with enough vessel capacity that U.S.-flag utilization will decrease to the point that additional aid will not be granted and the U.S. capacity would again bow to a foreign national.

In contrast and distinction to some earlier cases, the administrative law judge urges and finds that the Subsidy Board should adopt a standard procedure for measuring overtonnaging of a trade route. This measure should recognize the U.S. objective and avoid the influence of foreign-flag competition to the highest extent possible.

It is urged that the Subsidy Board should establish a policy of finding the existing U.S.-flag service inadequate unless sufficient capacity is operated on the involved trade route in the

dominant direction to carry 50 percent of the U.S.-foreign cargo when operating at the *lowest* vessel utilization that can be expected to warrant a sailing.

A subsidy can only go so far toward encouraging U.S.-flag competition. A subsidy is designed to keep U.S.-flag vessels' operating costs on a level with that of foreign-flag operators. A subsidy is not paid on cargo carried nor does it pay for empty space. Therefore, there is a utilization point where a vessel will not move because it is not economically advantageous. It is this point—a so-called "break even" point—that should be the utilization standard. An overtonnaged situation should be found only when the U.S.-flag capacity is capable of handling 50 percent of the relevant cargo pool even if only 75 percent of the capacity is utilized.

The relevant cargo pool in this proceeding has been established as including all cargo that normally moves in liner service. The amount of cargo that can be handled by the U.S.-flag carriers over the involved routes is well below 50 percent for the most part. However, trade route 5-7-8-9 employs a U.S.-flag capacity, with or without Waterman, to handle an excess of 50 percent of the cargo even at a low utilization. However, that figure relates to 1973 data which is now three years old. The adopted 1980 projection shows the U.S.-flag capacity on all trade routes to be unable to handle 50 percent of the cargo at a 75 percent vessel utilization.

The 1980 projection is clearly the more meaningful. The increased capacity would begin operations closer to 1980 than 1973. The 1980 projection shows the U.S.-flag capacity as being inadequate for the established goals.

It is argued that a 1980 projection is inadequate to support a 20-year subsidy agreement. This matter has been settled in prior decisions and need not be reargued here.[44] The length of the agreement is for the Subsidy Board to handle in administrative action under Section 601 of the Act. The 20-year limitation is simply the maximum time limit under the statute.

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[44] Waterman Steamship Corporation—Subsidy T.R. 12 and 22, *supra* at 1361-1362.

The Subsidy Board could, in its administrative discretion, agree only to a 10-year subsidy contract. Suffice it to say that a reasonable projection can only be made within a relatively short period of approximately six to seven years. The 1980 projection is sufficient for the Section 605(c) determination of inadequacy in this proceeding. The length of the ODS agreement, if any, is to be determined administratively by the Subsidy Board, without a hearing, under Section 601 of the Act.

Military cargo has not been singled out for specific treatment. The military cargo figures are in measurement tons. A long-ton measure is not given. If the measurement tons of vessel capacity used for military cargo were removed from consideration and a long-ton figure were used to reduce the cargo pool, the vessel capacity would be reduced in a greater amount than the cargo. This statistical change would be more beneficial to Waterman's position. Therefore military cargo volume and the vessel capacities allocated for its carriage have not been considered in detail. Further consideration would not give a different quantitative result nor change the statutory findings herein.

In considering the qualitative aspects, it is apparent that the Waterman proposal will offer a service alternative to that of the major U.S.-flag carriers, except Lykes, in that the service will not be as highly containerized. Of course, the service will certainly carry containers. In fact, the vessels may in the future be predominantly containerized, but the flexibility is there. Thus, to a large degree it is expected that Waterman will compete more strongly with foreign-flag carriers than U.S.-flag carriers.

It is noted that the itineraries generally involve service to and from the major ports of the major foreign trading countries of Germany, France, Belgium, and Holland (Le Havre, Antwerp, Rotterdam, Bremerhaven, and Hamburg). The service inadequacy on a port-to-port basis might well be different than the record showing which must be limited to an examination of

the trade route as a whole.[45] However, matters which would require limitations or extensions of itineraries, including operations as a regular berth liner on all routes, are not under consideration in a Section 605(c) proceeding except as to quantitative adequacy or purposes and policy. Suffice it to say that the Waterman itinerary does cover the major trading areas or ports involved on the trade routes in question and that the number of sailings proposed can be conducted within the bounds of "adequacy" on the trade routes as here determined. A port-to-port analysis is not made.

Sea-Land also argues that Waterman has not shown that its proposed operations can or will be conducted without relying on at least 50 percent of its cargo to be government preference cargo. Waterman admittedly has relied heavily on preference cargo prior to obtaining operating differential subsidies; however, it was certainly not precluded from such operations. Its carryings while under ODS appear to be in compliance with the Subsidy Board's S-244 regulations,[46] and it has increased the general cargo it handles.

Although Waterman has shown a substantial movement of "household goods and personal effects" as commercial cargo, Sea-Land contends that this is military cargo. While it may be that the cargo is *for* the military, most of such movements actually move in a commercial mode and are so classified.

Waterman's showing is satisfactory for 605(c) hearing purposes. If it should later develop that Waterman's carriage of preference cargo exceeds the 50 percent level, Waterman will be subject to the penalties prescribed.

2. Purposes and Policy

When an additional service application is considered and the U.S.-flag service is found to be inadequate, an additional finding under Section 605(c) is required, as earlier stated, as to whether in the accomplishment of the purposes and policy of the Act additional vessels (sailings) should be operated on the

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[45] American Mail Line—Cargo Restrictions, 2 MSB 103, 105-106 [6 SRR 95] (1965).

[46] 46 CFR § 280.3.

involved routes. The purpose of the Act is succinctly stated in the preamble as:

> "To further the development and maintenance of an adequate and well-balanced American merchant marine, to promote the commerce of the United States, to aid in the national defense, . . ."

The declaration of the policy is continued in Section 101, 210 and, by inference, in others as follows:

> "Section 101. It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine (a) sufficient to carry . . . a substantial portion of the waterborne export and import foreign commerce . . . (b) capable of serving as a naval and military auxiliary in time of war or national emergency, (c) owned and operated under the United States flag . . . (d) composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States . . . It is hereby declared to be the policy of the United States to foster the development and encourage the maintenance of such a merchant marine."

Stated generally, the purpose and policy is to promote the construction and operation of a U. S. merchant marine to serve the commercial and defense needs of the nation.

In numerous earlier cases it was recognized that a finding of inadequacy plus the increased operation to lessen the inadequacy would necessarily lead to the conclusion that the granting of the application is consistent with the purposes and policy.[47] However, more recent cases establish that the per se finding does not follow from an inadequacy conclusion coupled with an increased service proposal.[48] Therefore, the purposes and policy issue will be here considered. Even so, the purposes and policy considerations are tied to adequacy and operations rather than financial needs and costs of operations.[49]

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[47] Lykes Bros. Steamship Co., *supra* at 65.

[48] Subsidized Service on Routes 29 and 17, *supra* at 411-412.

[49] *Id.* at 413.

The service will promote a more balanced fleet with a broad range of vessels. Additional vessels will be constructed in U.S. shipyards. The additional vessels will provide an expanded capacity which will be available for defense purposes. The vessels are versatile and are not dependent upon special dockside facilities. They are self sufficient. It is also recognized that the services proposed would be competitive with that of foreign-flag carriers. There is no exceptional showing that would indicate that the purpose and policy of the Act would be better served by limiting the number of U.S.-flag competitors, ports served, or vessels operated to those of present record. The concentration of the nation's service in the control of a few carriers is not in the public interest. Moreover, the only intervenor does not operate a wholly U.S.-flag fleet. Its operations are quite dependent upon foreign-flag carriers and there is some question as to what extent the foreign-flag operations of a U.S.-flag operator should be protected at the expense of a complete U.S.-flag carrier. Certainly there is no showing here that this protection should reach the point of barring a consideration of granting the application solely under secondary issues of purposes and policy because of speculative effects on the mixed-flag operation.

In Sea-Land's preliminary motion, it sought to have Waterman's operations on T.R. 6 and 11 restricted to privilege calls. The matter is reargued by Sea-Land on the proposition that Waterman has not proposed separate itineraries or minimum service requirements. This is true to some extent. Waterman has given several itineraries that involve combinations of trade routes, but it does not show a T.R. 6 or 11 exclusive itinerary. Moreover, there is not enough volume to schedule specific, exclusive voyages on T.R. 6 and 11. However, Waterman treated these routes in the same manner as the others in presenting separate cargo data and projections. The itineraries were clearly shown to include these routes. The service will be more in a breakbulk vessel rather than containership operation consistent with the trade on routes, and Waterman is not using operations on T.R.'s 6 and 11 to justify operations on T.R.'s 5-7-8-9 and 11. It appears that here Waterman has sustained its 605(c) burden of proof. The

situation is different from that in American Export Lines, Subsidy Reinstatement, supra.

If there is to be an operational modification which would establish T.R. 6 and 11 operations as privilege calls only, such modification will have to be done by the Subsidy Board in its Section 601 administrative determinations.

The financial need of the applicant for subsidy is not in issue here. However, a stated goal of the 1970 amendments to the Act is an intent that there should be a lessening of dependence on subsidy. Sea-Land does not content that the 1970 amendments bar the award of subsidy to technologically advanced vessels, but that the need for an award of operating-differential subsidy for technologically advanced vessels should be considered under a purpose and policy finding. This view cannot be sustained. The purpose and policy findings cannot be expanded to reach all areas presently reserved by the Subsidy Board for its administrative policy determinations. The amount of subsidy may be far below a carrier's prior award. Moreover, the amount of subsidy may be reviewed or adjusted from time to time without a hearing. This reduction would be within the goal of the 1970 amendments of lessening dependence on subsidy. The 1970 amendments do not cover issues of due process or an expansion of hearing issues for intervening or opposing parties.

It is concluded that applicant has sustained its burden of proof and that Section 605(c) of the Act is not a bar to any further consideration of the application by the Subsidy Board.

IV. STATUTORY FINDINGS

Upon consideration of the evidence and argument of record, including the proposed factual findings and briefs submitted by the parties, and the foregoing report, including the factual presentation and the discussion and conclusion, the administrative law judge now finds:

1. that the operations proposed by Waterman Steamship Corporation involve vessels to be operated in an essential service, served by citizens of the United States;

2. that the proposed operations are in addition to the existing services as contemplated in the first clause of Section 605(c) of the Merchant Marine Act, 1936, as amended;

3. that the service presently provided by vessels of United States registry on the involved essential service trade routes is inadequate;

4. that in the accomplishment of the purposes and policy of the Act additional vessels should be operated on the involved routes;

5. that Section 605(c) of the Act is not a bar to the award of an operating-differential subsidy agreement to cover the involved operations;

6. that in view of the above findings, additional consideration or findings under Section 605(c) of the Act are not required.

APPENDIX C

Maritime Subsidy Board
Nos. S-421, S-455

WATERMAN STEAMSHIP CORP.

In the matter of proceedings under Section 605(c) of the Merchant Marine Act, 1936, as amended, relating to applications by Waterman Steamship Corporation for long-term operating-differential subsidy on Trade Routes 5-7-8-9 (U.S. N. Atl./U.S. and Cont.), 6 (U.S. N. Atl./ Scand. and Baltic), 11 (U.S. S. Atl./U.S. and N. Europe) and 21 (U.S. Gulf/U.K. and Cont.)

Decided: September 1, 1978
Served: September 5, 1978

FINAL OPINION AND ORDER

Robert J. Blackwell, Chairman; Samuel B. Nemirow, Member; James S. Dawson, Jr., Alternate Member.

Robert A. Peavy, Esq., and Wayne M. Lee, Esq., Morgan, Lewis & Bockius, Counsel for Waterman Steamship Corporation.

Edward M. Shea, Esq., and Gary R. Edwards, Esq., Ragan & Mason, Counsel for Sea-Land Service, Inc.

Robert G. Giertz, Esq., Public Counsel, Maritime Administration.

I. INTRODUCTION

This is the final decision of the Maritime Subsidy Board (Board) on the issues raised by exceptions to the Initial Decision (ID) [17 SRR 25] of Chief Administrative Law Judge (CALJ) William G. Spruill, dated January 11, 1977, in consolidated Dockets S-421 and S-455. The subjects of these dockets are the issues under Section 605(c) of the Merchant Marine Act, 1936, as amended (Act), as related to the applications of Waterman Steamship Corporation (Waterman) for long-term Operating-Differential Subsidy (ODS) on certain trade routes.

In Docket S-421, by an application filed August 17, 1973, as amended, Waterman seeks a 20-year ODS agreement for a maximum of 35 sailings annually on Trade Route (TR) 21 (U.S. Gulf/U.K. and Cont.) with the privilege of calling at ports on TR's 5-7-8-9 (U.S. N. Atl./U.K. and Cont.), 6 (U.S. N. Atl./Scand. and Baltic) and 11 (U.S. S. Atl./U.K. and N. Europe) with up to 24 sailings annually. In Docket S-455, by an application filed June 16, 1975, Waterman seeks a 20-year ODS agreement for a maximum of 35 sailings annually on TR's 5-7-8-9, 6 and 11.

Briefly stated, Waterman's service proposal is to operate from the U.S. Gulf and Atlantic Coast port ranges to various European, Scandinavian and Baltic countries, including ports in the U.S.S.R. east of Finland and in the Barents Sea. The sailings would be conducted initially with five Mariner class vessels. About 1980, these vessels would be replaced by three new roll-on, roll-off (RO/RO) type vessels, with the possibility of a fourth RO/RO being added later.

The applications were published in the Federal Register and petitions in opposition were filed by Sea-Land Service, Inc. (Sea-Land), United States Line, Inc. (USL), and Lykes Bros. Steamship Co., Inc. (Lykes), in one or both proceedings. (Lykes and USL subsequently withdrew their opposition to Waterman's application, leaving only Sea-Land actively opposed to the grant of the ODS agreement.) The matters were separately referred for hearing under Section 605(c) and

consolidated at a prehearing conference on September 16, 1975, in Docket No. S-455 over Waterman's objections.

Following an evidentiary hearing on the applications, the CALJ issued his ID, in which he found that:

> 1. The operations proposed by Waterman involve vessels to be operated in an essential service, served by citizens of the United States;
>
> 2. The proposed operations are in addition to the existing services, as contemplated in the first clause of Section 605(c) of the Act;
>
> 3. The service presently provided by vessels of United States registry on the involved essential service trade routes is inadequate;
>
> 4. Additional vessels should be operated on the involved routes in the accomplishment of the purposes and policy of the Act;
>
> 5. Section 605(c) of the Act is not a bar to the award of an operating-differential subsidy agreement to cover the involved operations; and,
>
> 6. In view of the above findings, additional consideration or findings under Section 605(c) of the Act is not required.

Sea-Land and Waterman filed exceptions and replies to exceptions following the ID, and the Board heard oral argument on March 9, 1978. Sea-Land maintains that the CALJ is in error and that Section 605(c) bars Waterman's applications. Waterman contends that the ID is correct in its ultimate conclusion that Section 605(c) is no bar to the application, but claims that U.S.-flag inadequacy on the routes is even more pronounced than the ID found, and that there are several minor deficiencies in the decision.

For the reasons set forth below, we conclude that Section 605(c) is a bar to grant of the requested subsidy on TR's 5-7-8-9, 6 and 11, but that it is not a bar to grant on TR 21. We also modify the CALJ's findings on several subsidiary issues related to all TR's at issue.

II. ISSUES

The principal issues raised by the exceptions and discussed below are:

1. Whether Waterman's proposed service on TR 21 qualifies as an existing service under Section 605(c);

2. Whether the CALJ's findings that U.S.-flag service on the routes involved is and will be inadequate was correct in fact and law;

3. Whether Waterman has sufficiently demonstrated its intent to reduce inadequacy on TR's 6 and 11 so that grant of the ODS requested would be consistent with the purposes and policy of the Act.

In addition, Sea-Land raises certain miscellaneous issues which we describe in more detail and discuss within the opinion.

III. DISCUSSION

A. Existing Service on TR 21

The CALJ properly recognized that Section 605(c) is divided into two mutually exclusive clauses, the first applicable to applications for additional service and the second to applications for existing service.[1] He then found that since Waterman's applications involve both existing and additional services, he need only reach the issues under the first clause, which are whether U.S.-flag service on the route is inadequate and whether in the accomplishment of the purposes and policy of the Act additional vessels should be operated thereon.[2]

Waterman takes pro forma exception to the CALJ's failing to analyze its operations on TR 21 and find that it operates an existing service on that route. It concedes the issue is moot if the CALJ was correct in concluding that U.S.-flag service on the

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[1] E.g., American Pres. Lines, Ltd., 17 SRR 1328 (MSB, 1977).

[2] E.g., Waterman S.S. Corp., 16 SRR 1357 (MSB, 1976).

route is inadequate. (Waterman does not contend, for purposes of this proceeding, that it has existing services on TR's 5-7-8-9, 6 or 11.)

In view of our conclusion that the CALJ was correct in finding that U.S.-flag service on TR 21 is and will be inadequate, we find it unnecessary to reach this issue, and see no error under the circumstances of these applications in the CALJ's resort to judicial economy in deciding potential issues.

B. Inadequacy of U.S.-Flag Service

The exceptions raise the following issues related to the CALJ's finding that the service provided by U.S.-flag vessels is inadequate, and will remain so for the foreseeable future (which the CALJ determined to be 1980):[3]

1. Whether in estimating the 1980 pool of cargo the CALJ erred in using a simple trend line to adjust Waterman's projections;

2. Whether the CALJ improperly used 1975 instead of 1980 projected capacity figures, and in particular whether the CALJ should have used 78 instead of 52 annual sailings for Sea-Land and 36 instead of 28 for Lykes because additional sailings would theoretically be made with existing vessels;

3. Whether projected capacity should be based on an assumed "break-even" utilization of 75%, or on a maximum utilization of not less than 90%;

4. Whether the CALJ was correct in assuming that the MarAd Container Reports show total cubic volume of container space rather than of the cargo;

5. Whether an adjustment should be made in projected capacity figures for expected military carriage;

6. Whether the CALJ correctly used 104 annual sailings for USL, based on a biweekly TR 5-7-8-9 service,

[3] Sea-Land also took exception to the CALJ's conclusion that 1980 was the most appropriate benchmark year for purposes of adequacy projections, but abandoned the issue at oral argument. Tr. VIII-9, 11.

or should have used 94 annual sailings based on the maximum it had achieved in the years of record.[4]

1. *Cargo Projections—Trend Line*

Assessment of the likely future adequacy of U.S.-flag service requires comparative analysis of cargo projections on the one hand, and projected capacity on the other. Both Waterman and Sea-Land offered testimony on future liner cargo movements. Bertram E. Rifas, of Manalytics, Inc., testified on behalf of Waterman. Using a macroeconomic model based on the relation between the GNP's and importants of the countries on the trade routes involved, Rifas offered specific cargo projections for 1980. Sea-Land's witness, Leo. J. Donovan of Booze, Allen & Hamilton, Inc., did not offer a separate forecast. He did, however, critique the Rifas forecast, opining that it was overly optimistic because it was based on a span of years (1969-1973) which began with unusually low and ended with unusually high movements of cargo, and because it ignored certain key factors (e.g., shortages of investment capital caused by government deficit financing).

The CALJ noted the uncertainties inherent in forecasting under any method, but agreed with Sea-Land that, to some extent, the Rifas forecast was based on factors (such as the span of years selected) which resulted in an overly optimistic forecast. He rejected Rifas' claim of having produced a "conservative" forecast.

In order to construct from the record some measure by which to objectively adjust the Rifas forecast, the CALJ extended the base period to include the years 1967 and 1968, and then derived from the record a simple time series trend line, extrapolated forward for each trade route to the year 1980.[5] Recognizing that the trend line thus resulting was not in itself any more inherently accurate than the projection made by Rifas, the CALJ reasoned that it nevertheless provided a conservative and rational adjustment for the optimism of the

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[4] Waterman also points out what it assumes to have been a transposition error in the CALJ's workpapers (I.D., App. C), in which he credits USL with 108 annual sailings, rather than the 104 stated in the text of the I.D.

[5] The methodology the CALJ used is set forth in App. B to the I.D.

Rifas projection. He concluded that an *average* of the Rifas forecast and the trend line would result in a "better and more reasonable projection of future cargo which recognizes somewhat the problems of forecasting, the differences of data, the selectivity of a time span, the point of application, an optimistic approach, conservative approach, mathematical approach, and subjective approach." (I.D. 32-36.)

Waterman contends that Rifas' projection produced a more accurate forecast than the trending method used by the CALJ, and argues that the CALJ's trending method was rejected by the Board in Docket S-267,[6] because it does not account for compound growth. It maintains that Rifas is an expert economist (the only expert witness to offer a cargo forecast), that Sea-Land has used the Manalytics firm in another Section 605(c) proceeding employing virtually the identical methodology, and that the Rifas projection is in fact conservative.

Sea-Land replies that Waterman fails to relate its exception to the ultimate findings on inadequacy, and that the CALJ properly weighed evidence of both Waterman's and Sea-Land's experts. It asserts that Donovan's testimony proved that Rifas' predictions were merely optimistic and deficient.

The difference between the CALJ's projection and the Rifas projection is as follows:

TABLE 1

Comparison of 1980 Forecasts, Dominant Leg Cargo (000 L/T)

	Rifas	CALJ Trend Line	Average (Accepted by CALJ)
TR 5-7-8-9 inbound	4,876	4,799	4,837
TR 6 inbound	1,049	514	782
TR 11 inbound	1,292	906	1,099
TR 21 inbound	3,621	2,180	2,901

Source: I.D. 35

[6] Subsidized Service on Routes 29 and 17, 14 SRR 387 (MSB, 1973).

We conclude that the CALJ did not err in adjusting the Rifas projection, and that his adjustment was not contrary to our holding in Docket S-267.

As the CALJ noted, forecasting is not yet a systematic science with universally accepted techniques. The most acceptable method in a given problem will depend on the facts in evidence, the quality of the expert forecasting available, and the trier-of-fact's assessment of the ultimate relation between the two.

In Docket S-267, we rejected the bare use of a simple straight line growth rate projection, since it did not account for compound growth.[7] In this proceeding, the CALJ did not simply make bare use of a trend line. Rather, he accepted the basic soundness of the Rifas method, but identified at least one principal defect in its application to the facts, namely the choice of time span. (See I.D. at 30-35 for detailed discussion.) It was his reasoned conclusion on inspection of the facts of record that the time span selected by Rifas resulted in an overly optimistic projection.

Faced with the need to make a rational adjustment based on that conclusion and on the facts of record, the CALJ selected the use of a trend line, first as a means of comparison to the Rifas forecast, and then as a means of correcting the defect he had identified.

We agree with the CALJ's reasoning regarding both the defect in the application of the Rifas method to time span, and with his selection of method to correct for that defect. While there may well be other methods equally useful for testing and correcting forecasts, the one selected by the CALJ under these circumstances is reasonable, relates to the record facts in a rational way, and corrects the specific defect found in the Rifas forecast.

2. *Capacity Projections—1975 Capacity for 1980*

In projecting capacity for 1980, the CALJ reasoned that he should use only capacity "currently on steam and scheduled"

[7] 14 SRR at 401.

because there was no firm evidence of any additional planned capacity, and the 1980 date is close enough that any such additional vessel increases should be known now. He continued:

> "Inasmuch as the supply of vessel capacity is expected to respond to the demand for space, it is proper to consider that today's presently planned vessels and schedules will be maintained, with close proximity, up to the date of forecast . . . Therefore, the concept of comparing measure or space capacities using presently known U.S.-flag vessels and operations against projected future tonnages within a five- and seven-year period is allowable and will satisfy the requirements of the Act.
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> * * * * * *
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> "To do otherwise [than use probable sailings and not theoretical sailings] would allow a U.S.-flag carrier to effectively control the size and competition of the U.S.-flag simply by operating high speed-design vessels on the route even if such vessels were not in fact being operated at the design speed" (I.D. 46-48, 74).

Sea-Land protests against the CALJ using 1975 capacity for 1980. It maintains that 1975 capacity data cannot be validly compared with 1980 cargo data, that neither cargo nor capacity is reasonably likely to remain static for five years, that within the last five years there have been at least three increases in U.S. capacity in less than a year and the same type of change in the next five years can reasonably be expected, that as Waterman's expert recognized it is the supply of cargo that determines capacity, and that with projected increase in cargo, it is reasonable to assume an increase in capacity.

Sea-Land also takes issue with the CALJ's using 1975 data, which it claims reflects "the adverse cargo conditions attendant in the recession year 1975" rather than the full carrying capacity of the 1975 fleet. Sea-Land argues that the correct measure of capacity is that level which may reasonably be

anticipated as a practical matter to be sustained over an extended period, citing the Board's decision in Docket S-267.[8] Sea-Land says that, with increased cargo offering, it would offer 78 annual sailings on TR 5-7-8-9 and 60 annual sailings on TR 21 (none on TR 11), and that Lykes would offer, and in the past has offered, 36 annual sailings on TR 21. The CALJ allotted 52 annual Sea-Land sailings on TR's 5-7-8-9 and 21, and 28 annual Lykes' sailings on TR 21 (I.D. 53).

Waterman replies that the CALJ took into account planned additions on the trade route and used 34 more sailings than were performed in 1974 or 1975. It maintains that it is improper to take into account speculation on new vessels to be added to the routes by purchase or reassignment, arguing that it would be just as invalid to speculate on vessels that would be removed from the routes. It contends that its expert's testimony was that capacity would bear a relationship to cargo *over the long-term,* because he assumed MarAd would award ODS to encourage U.S.-flag operators to increase their capacity. It defends the CALJ's capacity figures for Sea-Land and Lykes, although arguing that even those figures are generous. It argues that Sea-Land has not even expressed an intention to increase sailings, only stated that it has such capability. It believes that because of fuel costs and operating conditions Sea-Land's increases are most unlikely. It denies Lykes ever operated 36 annual sailings and notes that the most even Lykes projected in its 605(c) hearing was 30 annual sailings. It protests that if the Board permitted consideration of theoretical capacity, it would grant opposing operators an effective veto over the required 605(c) findings.

Sea-Land's objections on both counts are unfounded. Its exception with respect to the CALJ's alleged use of 1975 capacity for 1980 does not accurately characterize either the CALJ's narrative or the numbers he actually employed. In his narrative, the CALJ plainly stated that he would consider capacity "currently on stream *and scheduled*" (I.D. 46) and "*planned* vessels and schedules" (I.D. 48). In other words, the CALJ said that he would accept existing capacity, plus any

[8] *Supra,* n.6.

capacity currently shown to be planned or on stream such that it is likely to be in service by 1980.

The following table demonstrates that the CALJ did in fact make allowances for increases over existing capacity, as demonstrated by 1974 and 1975 (annualized) sailings, by significant percentage amounts.

TABLE 2

	Actual No. of Voyages(a)		Projected No. of Voyages(b)	Percent Increase
Carrier	1974	1975	ID 1980	1975-1980
Sea-Land SL-7's	48	44	52	18%
USL	87	90	104	16%
AEL	52	60	68	13%
Lykes	24	24	28	17%
Sea-Land SL-18's	32	52	52	—

(a) Source: Data from Ex. SL-21 for Sea-Land; Ex. SL-32 for USL; Ex. SL-33 for AEL; Ex. SL-38 for Lykes. The 1975 voyages are annualized from six-month figures.

(b) Source: I.D., App. C., p. 1, col. (4), corrected for transposition error as to USL.

Thus, Sea-Land errs in characterizing the CALJ's 1980 capacity computations as mere unadjusted and static extensions of 1975 capacity.

Sea-Land's argument that more capacity might theoretically be added, either by new construction or service changes (e.g., increased speed, route realignment) simply boils down to the proposition that "anything might happen." As undeniable as that proposition may be as a matter of formal logic in a philosophical sense, it is not a useful tool of analysis within the confines of the problem presented in hearings under Section 605(c). Administrative tribunals, like courts, must decide matters of fact on evidence and not merely theoretical postulates. In the absence of any relevant evidence demonstrating the likelihood that the *possibilities* Sea-Land enumerates will *probably* occur, the CALJ was correct in rejecting this part of Sea-Land's argument.

We do agree with Sea-Land that to some extent capacity responds to available cargo. It is too simplistic, however, to suggest, as does Sea-Land, that the response will be direct and on a one-for-one basis. If that argument were valid, there would never be a need for ODS, since U.S.-flag capacity would "naturally" grow with the available cargo. That proposition, however, has been demonstrated false time and again in the ocean trades in which our merchant fleet competes. As Waterman points out, U.S.-flag capacity growth, or diminution, is a function of many variables beyond simple supply and demand, including the grant or withholding of ODS as well as the actions of other governments.

The speculative nature of these arguments of Sea-Land is more concretely demonstrated in its claim that the CALJ's capacity figures do not reflect the "maximum practical cargo carrying capability" of its and Lykes' vessels. Thus, with respect to its own sailings, Sea-Land relies (1) on the possibility that certain unspecified conditions might induce it to operate its SL-7 vessels at higher speeds for which they were designed in the halcyon days before the "energy crisis," and (2) on the fact that it could rearrange its vessel deployments. Of course, these are theoretical possibilities. It is not inconceivable that some dramatic circumstances may change the economics of operating Sea-Land's SL-7 vessels, and any unsubsidized operator is free to redeploy its vessels as it wishes. But Sea-Land has not built into this record particulars sufficient for the fact-finder to conclude that it will in fact do either of these things under foreseeable conditions.

Sea-Land's assertions with respect to the maximum capability of Lykes' SEABEE voyages is simply not supported by the record, which does not show that Lykes' vessels have ever achieved the 36 sailings on TR 21 of which Sea-Land claims they are capable. Lykes' own data [Ex. SL-38] show an annual actual frequency of only 24 sailings, and there is no evidence—as opposed to speculation—that Lykes plans or could efficiently operate the SEABEE more frequently.

3. *"Break-Even" Utilization*

All of the parties accept the proposition, well-established in earlier proceedings under Section 605(c),[9] that some adjustment must be made to the gross U.S.-flag capacity expected to be available on a given trade route. In the long-term U.S.-flag vessels are not expected to operate at 100% utilization whether measured by space or weight. The net capacity after adjustment for this utilization, and certain other technical adjustments, is then compared to the projected cargo pool to determine what percentage of that pool might be carried by U.S.-flag vessels.

In past proceedings, we have applied a utilization factor which was based on evidence of the actual utilization experience on the trade routes involved, adjusted as necessary for anticipated changes in such factors as cargo mix and vessel characteristics.[10] The CALJ in this proceeding unilaterally abandoned that practice and urged that we instead adopt a *minimum* utilization figure at which U.S.-flag carriers can be expected to continue operations and compete for cargo. In the CALJ's words, "there should not be any prohibition against a subsidy until there is enough U.S.-flag capacity on the trade route to handle 50 percent of the tonnage at close to a 'break-even' point." (I.D. 62.)

The CALJ determined on this record that U.S.-flag carriers would break-even on the trade routes involved at 75% utilization, although the only evidence as to actual break-even points for any operator related to Sea-Land alone and showed its "break-even" point at 70%. By such adjustment to gross projected U.S.-flag vessel capacity, be reduced by 25% the U.S.-flag tonnage to be compared against the relevant cargo pool.

Sea-Land takes strenuous exception to the CALJ's utilization computations, arguing that the proposed method assures subsidized overtonnaging, is without foundation in the Act, and bears no relation to the economic realities of ocean trade. It

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[9] E.g., Waterman S.S. Corp., 16 SRR 1357, 1376 (MSB, 1976).

[10] *Id.*

argues that the Board should reject the CALJ's utilization factor method, and use instead its former method of basing utilization on "practical operating limitations." Sea-Land argues the use of a utilization factor of no less than 90 percent.

Waterman defends the CALJ's formulation. It argues from the premise that foreign and third-flag overtonnaging is likely at some times, if not always, to drive U.S.-flag vessel capacity utilization to low levels, the floor of which is the "break-even" level. The argument continues that, since it is realistic to expect such low levels of utilization to occur, and since the ability of the U.S.-flag fleet to carry the minimum goal of 50 percent of available cargo is correspondingly reduced during such periods, adequacy should be measured "not at the fair-weather point of high utilization, but at the stormy point of low utilization." In addition, Waterman contends that, in any event, the record supports a factual finding that actual capacity utilization on the trade routes involved has not averaged in recent years more than 75%.

We reject the method which the CALJ proposed. It is the mirror image of Sea-Land's arguments regarding the possibility of speeded up vessel operations and itinerary changes, and suffers from the same conceptual defect. The method does not address itself to what has been and is likely to be the *actual* utilization experience on the routes involved, but upon *theoretical* suppositions of "worst case" conditions. There is as little limit to the "worst case" vessel utilization conditions which might be hypothesized as there is to Sea-Land's "best case" operating conditions. If these speculative "break-even" suppositions were allowed to control our determinations under Section 605(c), U.S.-flag service might well never be found to be "adequate," and the simple and pragmatic safeguard to the health of existing U.S.-flag service intended in Section 605(c) would be gutted.

It is no answer to say that the Act intends that poor times as well as good times be considered. A determination based on actual experience, adjusted for sound projections for any changes, allows for the lowest possible utilization levels on a given route, if that is *in fact* the case. It is error to simply

assume that because the lowest of utilization levels is possible (for whatever reason), they will likely occur.

Sea-Land, however, is incorrect in its assertion that we have established any set figure on the minimum utilization level acceptable for analysis under Section 605(c) for all purposes. The question has always been, and is in this proceeding, what is the "percent of utilization *expected to be achieved.*"[11] This will largely depend on current experience, as adjusted by considerations of likely future conditions.

The CALJ made no specific finding as to what utilization might be projected to 1980, making only elliptical reference to the subject by stating that "[m]ost utilization figures are in the 80 percent range," without specifying that he was referring to this record and the trade routes involved herein. In fact, the I.D.[12] and the record contains data which indicate that Sea-Land has, with the exception of 1975 and its 1973 inaugural year on TR 21, had the very high utilization experience on the predominant legs of about 90% average on TR's 5-7-8-9 and 6 inbound, and about 94% on TR's 21 and 11 outbound. (Ex. SL-20.) The historical utilization data on the other operators on these routes is less comprehensive in terms of time span, but shows somewhat less favorable utilization on these routes.[13]

Given the success of Sea-Land in achieving high utilization over the long-term, the fact that it urges adoption of a 90% utilization factor, and the fact that the experience of other operators for the short time period statistics are available is in several instances near 90%, we believe that the most reasonable

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[11] Subsidized Service on Routes 29 and 17, 14 SRR 387, 408 (MSB, 1974) (emphasis added).

[12] See, I.D. at 9-19.

[13] Briefly, Waterman's utilization on the dominant outbound leg of TR 21 was 91% in 1974, 86% in 1975 (annualized); Lykes on the same leg was 90% and 82% for barges, and 71% and 67% for containers, same years respectively. USL's utilization on the inbound leg of TR 5-7-8-9 was 80% in 1974 and 53% in 1975 (annualized); AEL's on the same leg was 71% and 55%, same years respectively. See, Exs. SL-32, SL-33, SL-38, WS-8 and WS-9.

projection for operations in normal years is that container utilization will be about 90% in the benchmark year of 1980.[14] We have therefore adjusted the CALJ's capacity calculations accordingly.

4. *Container Cargo Stowage Factor*

In determining gross capacity (before the utilization adjustment discussed above), the CALJ basically allocated to each trade route gross measurement tons (MT) of vessel capacity,[15] based on the physical characteristics of the vessels and the projected number of sailings. Cargo figures were expressed in long tons (LT). Since the vessels on these routes "weighed out" (reached maximum LT capacity) before they "cubed out" (reached maximum MT capacity), it was necessary to convert MT's of dimensional capacity into LT's of actual cargo-lifting capacity.

To so derive container capacity, the CALJ calculated the following containerized cargo "stowage factors" for 1970-1973:

TABLE 3

CALJ's Stowage Factors

TR	(f)
TR 5-7-8-9 (inbound)	2.81
TR 6 (inbound)	No data*
TR 11 (outbound)	3.08
TR 21 (outbound)	2.83

* Note: No container capacity allocated to this route by CALJ.

The CALJ derived these factors from MarAd's Containerized Cargo Statistics for 1973 and 1974, first converting the cubic feet shown therein to MT's (cu. ft. + 40), then dividing the MT's by LT's of cargo.

[14] Further, it seems that Waterman has indicated confidence in having adequacy judged on the basis of a 90% utilization factor. Reply to Exceptions by Waterman Steamship Corp. at 27-28.

[15] One MT = 40 cubic feet.

Waterman contends that the CALJ correctly recognized the need for such "stowage factors," but erred in assuming that the cubic feet figures in the MarAd Container Reports showed the total cubic volume *of container* space required to stow and transport the cargo in containers. It argues the Reports only show the total cubic volume *of the cargo itself* without reference to the amount of container space the cargo will occupy when loaded into containers. Thus, Waterman claims, the CALJ actually derived cargo density factors, not stowage factors.

Waterman derives what it claims are the correct container cargo stowage factors by (i) obtaining the average number of twenty-foot equivalent units (TEU's) per container on each route after examining the container mix (20′, 35′, 40′); (ii) multiplying this factor by number of containers handled by U.S.-flag operators; (iii) based on a constant of 1100 cubic feet per TEU, multiplying TEU's by 1100; (iv) based on a constant of 40 cubic feet per MT, dividing cubic feet by 40; (v) dividing MT's of container space by LT's of cargo weight to get stowage factor. Waterman claims its stowage factors so derived correspond with stowage factors actually reported by containership operators. Waterman's container stowage factors for 1970-1973 are as follows:

TABLE 4

Waterman's Stowage Factors

TR	(f)
TR 5-7-8-9 (inbound)	4.08
TR 11 (outbound)	3.62
TR 21 (outbound)	2.96

Application of Waterman's stowage factors would result in a smaller (less adequate) U.S.-flag cargo carrying capacity.

Sea-Land dismisses Waterman's corrections as an "exercise" in "convoluted manipulations," claiming that the factors adopted by the CALJ and the use of the MarAd reports are supported by the testimony of Waterman's own expert economic witness. It argues more specifically that there is no evidence

as to container mix to support Waterman's derivation, that Waterman incorrectly assumes that all containers are filled to capacity on these routes, and that its own stowage factors of 1.9 (N. Atl.) and 1.5 (Gulf) overall are the only factors clearly supported by actual operating experience and in the record.

We agree with Waterman that it would not ordinarily be correct methodology to derive container stowage factors by simply dividing MT's of container space in the MarAd report by LT's of cargo, since the report does show actual cubic volumes of cargo without reference to total available container space. The resulting figures, however, could well be sound depending on the density of the cargoes typically moving on the route involved. Less dense cargoes would tend to have more nearly equal stowage factors and cargo density factors.

We cannot, however, accept the corrections proposed by Waterman for several reasons. In the first place, a key point of the argument is based entirely on counsel's undocumented assumptions as to the likely container mix among the several operators involved, without evidence in the record as to this mix, and without even the opinion of an expert witness. Without that evidence or opinion, the remainder of the proposed computation is reduced to nothing more than speculation.

In the second place, Waterman's own economic witness, Rifas, while recognizing that the MarAd container report figures yielded cargo density factors, as opposed to stowage factors, clearly accepted their usefulness on these routes as a measure of container stowage efficiency, apparently because of the nature of the cargo typically carried. Thus, he testified that the factors derived for containers from these data were "logical."[16] Moreover, his own estimate of the likely relation between Waterman's actual breakbulk experience and the container stowage factors (container factor of 10% over Waterman breakbulk experience) was somewhat lower than the stowage factor utilized by the CALJ, contrary to the much higher factors Waterman argues for in its exceptions.

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[16] Ex. WS-5 at V-3 (Rifas Testimony).

Finally, the figures Waterman proposes are grossly out of line with the record data concerning Sea-Land's actual operations.[17] While we do not accept Sea-Land's arguments that its less-than-trailerload data is sufficient from which to derive factors for the whole of container movements in these trades, we do find that they indicate somewhat the unreliability of Waterman's post-record, ad hoc analysis.

In our view, the CALJ's derived container stowage factors should be accepted on this record given Waterman's own expert witness' judgment that the density factors on these routes were "logical" for use as container stowage factors. Accordingly, we accept the container stowage factors utilized by the CALJ.

5. *Military Cargo*

The CALJ made no adjustment in capacity figures for military cargo because (i) a long ton measure was not given for military carryings, (ii) some corresponding but not identical reduction would be necessary in the cargo pool, and (iii) the net adjustment would be in Waterman's favor and would not change the ultimate findings of the Initial Decision. (I.D. 77.)

Waterman complains that the LT measure of military carryings is a matter of record and military cargo has already been virtually completely excluded from the pool of cargo considered by the CALJ. It does not, however, quantity the resulting adjustment.

We agree with Sea-Land that since virtually no military cargo moved inbound on TR 5-7-8-9 the question is de minimis as to TR's 5-7-8-9, 6 and 11 adequacy. Any adjustment for military carriage on TR 21 is moot, since, as the CALJ pointed out, any adjustment would only enhance inadequacy of U.S.-flag service on that route.

6. *USL Capacity*

The CALJ credited USL with two weekly containership voyages on TR 5-7-8-9, or 104 annual voyages (I.D. 53). Waterman excepts to this, claiming that the most USL ever operated in the last five years of record was 94 sailings, with an

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[17] Ex. SL-18 at 21.

average of 86. It argues that USL should therefore be credited with no more than 94 annual sailings. Sea-Land replies that Waterman's own expert predicted 104 USL annual sailings, and that Sea-Land's own estimate of 94 was based on existing cargo and not on the increase in the liner pool projected by the CALJ and Waterman.

It is not entirely clear upon what reasoning the CALJ's projection of USL sailings was based. He makes reference to the "USL scheduled pattern of two weekly voyages" as being "likely to continue." (I.D. 53.) However, the record establishes, and his own tables (I.D. 13) confirm that USL performed no more than 94 annual sailings. Nonetheless the increase over past operations which the CALJ credited USL is consistent with that which he credited to other operators (see Table 2, supra), and is consistent with the estimate of Waterman's own expert. For that reason, we accept the CALJ's finding.

However, the CALJ inexplicably used the figure of 108 annual voyages in the working papers attached to the I.D. (App. C at 1). This is inconsistent with his statement in the text of his opinion and can only be assumed to have been an error of transposition. We therefore correct the CALJ's calculations accordingly.

7. *Adequacy Calculations*

After correcting the CALJ's computations to reduce the number of USL annual sailings to 104 from 108, and employing a utilization factor of 90% rather than 75%, the following adequacy figures result:

TABLE 5

1978 & 1980 U.S.-Flag Adequacy

TR	1978		1980	
	With Waterman	Without Waterman	With Waterman	Without Waterman
5-7-8-9 inbound	66%	61%	52%	48%
6 inbound	9%	3%	8%	2%
11 outbound	45%	35%	34%	27%
21 outbound	57%	47%	44%	36%

It is clear from this table that U.S.-flag service on TR 5-7-8-9 is adequate, although declining to some extent.[18] Service on the other routes involved, on the other hand, is clearly inadequate without Waterman's service and will continue to become more so by 1980. U.S.-flag service on TR 5-7-8-9 will be adequate in 1980 since there will be in excess of 50% U.S.-flag participation, and there is insufficient evidence on the record to conclude that Waterman would be able to attain sufficient service to exceed 50% US.-flag participation.

It is true that service on TR 5-7-8-9 without Waterman is projected to be only 48% U.S.-flag competition on slightly less than 50% participation. Waterman seeks a full subsidized service on TR 5-7-8-9. While there might be some basis for permitting some participation of Waterman on TR 5-7-8-9, the record does not support granting subsidy to Waterman for its proposed services.

C. Purposes and Policy—TR's 6 and 11

Under the first clause of Section 605(c) it is necessary to consider whether in the accomplishment of the purposes and policy of the Act additional vessels should be operated on the involved routes. The CALJ reasoned that subsidizing Waterman's proposed RO/RO service would result in a more balanced U.S.-flag fleet, would expand the fleet capacity for defense purposes, would add versatile and self-sufficient vessels, would provide greater competition with foreign flag operators in broader ranges of cargoes and would result in healthy additional U.S.-flag competition. (I.D. 80-83.)

Sea-Land takes limited exception. It maintains that Waterman failed to propose any separate itineraries for privilege operation on either TR 6 or TR 11, and indeed stated it would only call when cargo was available. Sea-Land argues that this

[18] The CALJ constructed a table of U.S.-flag adequacy for 1973, apparently with the view of expressing "present" (1977 presumably) adequacy apart from 1973. (I.D., App. C.) It differs substantially from the statistical indication of historic U.S.-flag participation. (I.D. 23, App. A.) Since no party took issue with the CALJ on this matter we have followed his calculations in this instance, except as expressly modified herein.

proceeding is indistinguishable from the situation in Docket No. S-288[19] where the Board found that the applicant had failed to meet its burden of affirmatively showing that the proposed additional service would lessen the inadequacy of U.S.-flag service.

Waterman replies that Sea-Land is merely reviving its attempt to limit Waterman's service on TR's 6 and 11 to privilege calls, earlier rejected by the CALJ. (I.D. 82-83.) Waterman claims that its presentation differed from that in S-288 in that it showed present and projected inadequacy of U.S.-flag service on the route, and plans to regularly serve ports on these routes.

We agree with Sea-Land. Although the factors cited by the CALJ under this issue are generally relevant to the purposes and policy issue, none directly addresses what we have held to be a key issue, namely, whether the proposed additional service would lessen the inadequacy on the specific routes involved.[20] Since the applicant has an affirmative burden on this issue, it follows that at the threshold it must show that it will provide additional service and that the service will lessen the inadequacy.

In S-288 our pivotal concern was that the applicant had failed to show that it had given consideration to operations on TR's 6 and 11, *independent* of its proposed operations on TR 5-7-8-9. The same defect is present in Waterman's presentation. Waterman's chairman of the board admitted in oral testimony that Waterman had not given thought to operations on 6 and 11, independent of operations on 5-7-8-9. (TR.I-23.) Waterman's proposed itineraries likewise reflect an "integrated" "Atlantic Itinerary" for TR's 5-7-8-9, 6 and 11 (Exs. WS-1 at 2, WS-3 at 2, WS-11, WS-12). Such "integrated" service on TR's 6 and 11 in fact is no indication of any service since the proposed itineraries specifically note that service to the ports which would be on TR's 6 and 11 will be as cargo warrants without any indication of what the cargo demand is reasonably expected to be. (Exs. WS-11, n.1; WS-12; n.1; TR.I-21.)

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[19] American Export Lines, Inc., 14 SRR 1539 (MSB, 1975).

[20] Subsidized Service on Routes 29 and 17, 14 SRR 387, 414 (MSB, 1974).

Although Waterman has shown the cargo expected to be moved by all carriers on TR's 6 and 11, it has not shown the cargo it expected to carry and generally has failed to demonstrate a serious enough thrust onto this route to enable us to make the affirmative finding, under the purposes and policy clause, that its service would reduce U.S.-flag inadequacy of service. For this reason, we hold Section 605(c) to be a bar to the grant of subsidy for service on TR's 6 and 11 as proposed by Waterman.

D. Miscellaneous Issues

1. *Official Notice Issues*

Subsequent to the close of the hearing record, Sea-Land twice sought official notice to be taken of certain documents: once before the CALJ and once before the Board. It should be noted that different rules apply on official notice between the CALJ and the Board.[21]

In its proposed findings of fact before the CALJ, Sea-Land made reference to certain correspondence between Lykes and the Board, which it appended to its opening brief, and requested unsuccessfully that the CALJ officially notice under our Rules of Practice and Procedure, 46 CFR § 201.132(g). Sea-Land repeats its request before us.

Waterman opposed the CALJ taking official notice of the documents but takes the position that Sea-Land's expection before us "does not merit a response," since their inclusion in the record would be "harmless," neither detracting from the I.D.'s findings nor adding meaningful content to the record.

The documents at issue are two letters from Lykes to the Director, Office of Subsidy Administration, dated October 22, 1975, and February 10, 1976, and a letter from the Board's Secretary to Lykes dated March 24, 1976. The letters relate to the Board's approval of the reduction of certain of Lykes' minimum sailing requirements, including those on TR 21. They

[21] 46 CFR § 201.132(g) applies to official notice at hearings whereas 46 CFR § 201.160 applies to official notice in decision making after hearings.

were offered by Sea-Land presumably to show Lykes' pessimistic view of cargo availability, at least as of the time the letters were written.

It was not error for the CALJ to refuse to notice the letters from Lykes. A letter from a private party to MarAd does not qualify as "a public document . . . issued by any of the executive departments . . . , legislative agencies or committees, or administrative agencies of the Federal Government" which may be officially noticed during hearing under 46 CFR § 201.132(g).

The letter from MarAd to Lykes, on the other hand, could arguably be a public document within the meaning of the section. While we disapprove of eleventh hour maneuvers to supplement the records in these proceedings without the benefit of cross-examination and informed briefing, Waterman does not seriously contest notice of the documents before us. We therefore notice the documents, with the observation that we do not consider them to have effectively impeached the CALJ's findings on relevant cargo movements.

Sea-Land's second request was in the form of a motion made at oral argument, asking the Board to notice cargo statistics for 1974, 1975 and 1976 compiled by MarAd's Data Analysis Group. (The record below included data only through 1973.) Waterman does not challenge that the Board might notice these statistics under the somewhat broader official notice provision applicable to the Board, 46 CFR § 201.160, but points out that the Board is not compelled to do so. It further cautions that the raw data have not been subjected to analysis for purposes of projection.

We admit the data for such historical perspective as they lend to the record. We have specifically avoided constructing from them alternate cargo projections for the future. Without expert analysis of (i) the trends and occurrences underlying these data, (ii) their significance for the future, and (iii) their relation to data already in the record, such an attempt would be plainly misguided.

2. *Preference Cargo*

In Docket S-244,[22] we addressed the question of the payment of subsidy for liner carriage of preference cargo claimed and proposed a rule to govern this situation, now found at 46 CFR Part 280. In essence, the regulations prohibit or restrict subsidy payments for excessive carriage of certain preference cargo, the carriage of which does not involve meeting foreign flag competition. We also stated that although the principles embodied in that rule are intended to reflect the requirements of Section 601 of the Act, the applicant's satisfaction of the standard expressed in the rule (anticipated carriage of at least 50% of commercial cargo, conference-rated civilian preference cargo and open-rated civilian preference cargo carried at world rates) might, in some instances, be a proper subject for consideration under the Section 605(c) "purposes and policy" standards.[23]

Admitting evidence on this question, the CALJ found that while Waterman had heavily relied on preference cargo before obtaining ODS, its carryings after award of ODS were in compliance with 46 CFR § 280.3,[24] that it had increased its general cargo carryings. He also found that moving household goods and personal effects were largely commercial movements and not military movement and therefore that Waterman could conduct its operation without relying on at least 50% of preference cargo. (I.D. 79.)

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[22] Subsidy and Preference Cargoes, 3 MA 268 [13 SRR 44] (MSB, 1972), aff'd sub nom. States Marine Int'l, Inc. v. Peterson, 518 F2d 1070 [15 SRR 27] (DC Cir. 1975), cert. denied, 424 US 912 (1976).

[23] Subsidy and Preference Cargoes, supra, 3 MA at 289.

[24] 46 CFR § 280.3 provides:

> "No ODS agreements, including any amendments thereto concerning additional services or revised service area, shall be made under Title VI of the Act unless the applicant establishes in its application that the vessel operations proposed to be subsidized will be conducted in a manner which will not preclude the applicant from carrying at least 50 percent of its inbound gross freight revenues and at least 50 percent of its outbound gross freight revenues for each service covered by the application from the carriage of commercial cargoes, conference-rated civilian preference cargoes, or open-rated civilian preference cargoes carried at 'world' rates."

Sea-Land argues in its exceptions that Waterman failed to meet its burden of proof that it would not in the future rely heavily on military cargo, which it had carried while unsubsidized. It also charges Waterman with refusing to establish what portion of general cargo was household goods and personal effects not covered by conference rates.

Waterman replies it showed that, under its short-term ODS contract, it had dropped its heavy reliance on military cargo and increased carriage of general cargo. It also claims that household goods and personal effects are commercial cargo for purposes of 46 CFR Part 280 and are conference rated. It argued that even if it did carry excessive preference cargo under the S-244 regulations it would be subject to penalties.

We see no error in the CALJ's findings. As he pointed out and the record supports, Waterman appears to have reduced its carriage of preference cargo to acceptable levels after its award of ODS, and has demonstrated within the reasonable limits of prognostication that it intends to stay within the rule established in Docket S-244. Under these circumstances, we find that the regulations provide sufficient safeguard against the possibility of excess carriage by Waterman.

3. *Sea-Land's Foreign Flag Operations*

The CALJ noted in passing that Sea-Land does not operate a wholly U.S.-flag fleet but instead is "quite dependent on foreign-flag carriers." He said there is "some question about" the protection accorded to the foreign-flag operations of a U.S.-flag operator vis-a-vis a "complete U.S.-flag carrier." (I.D. 82.)

Sea-Land takes exception to the CALJ's remark, which it surmises was made in reference to its use of foreign-flag feeder vessels in Europe. It maintains that the Board has permitted subsidized operators to use such vessels, and ought not penalize Sea-Land for using them.

Sea-Land's foreign-flag operations are wholly irrelevant to any of the issues in this proceeding. Sea-Land's standing is based *solely* on its U.S.-flag service on the routes in question. Having established its standing, it is entitled to the full protec-

tion to its U.S.-flag operations afforded U.S.-flag operators under Section 605(c). Its foreign-flag operations therefore have not been a factor in our deliberations in this proceeding.

IV. CONCLUSION

For the foregoing reasons, the Board finds and concludes with respect to the applications of Waterman for long-term operating-differential subsidy on TR's 5-7-8-9, 6, 11 and 21 and Section 605(c) of the Act:

(1) U.S.-flag service on TR 5-7-8-9 is, and will be for the foreseeable future, adequate and Section 605(c) is therefore a bar to the award of ODS to Waterman for service on that route;

(2) U.S.-flag service on TR's 6,11 and 21 is, and will be for the foreseeable future, inadequate;

(3) The operation of the service proposed on TR 21 by Waterman will be within the accomplishment of the purposes and policy of the Act;

(4) Waterman has failed to show that its proposed operations on TR's 6 and 11 would further the purposes and policy of the Act, and therefore Section 605(c) is a bar to the grant of ODS to Waterman for operation of services on those routes;

(5) Section 605(c) is no bar to the award of ODS to Waterman on TR 21.

APPENDIX D

Maritime Subsidy Board
Nos. S-421,
S-455

WATERMAN STEAMSHIP CORP.

In the matter of proceedings under Section 605(c) of the Merchant Marine Act, 1936, as amended, relating to applications by Waterman Steamship Corporation for long-term operating-differential subsidy on Trade Routes 5-7-8-9 (U.S. N. Atl./U.K. and Cont.), 6 (U.S. N. Atl./ Scand. and Baltic), 11 (U.S. S. Atl./U.S. and N. Europe) and 21 (U.S. Gulf/U.K., Cont., Scand. and Baltic).

Decided: November 15, 1978
Served: November 16, 1978

ORDER DENYING RECONSIDERATION

Robert J. Blackwell, Chairman; Samuel B. Nemirow, Member; James S. Dawson, Jr., Alternate Member.

Robert A. Peavy, Esq. and Wayne M. Lee, Esq., Morgan, Lewis & Bockius, for Waterman Steamship Corporation.

Edward M. Shea, Esq. and Gary R. Edwards, Esq., Ragan & Mason, for Sea-Land Service, Inc.

Robert G. Giertz, Esq., Public Counsel, Maritime Administration.

I. INTRODUCTION

By separate petitions dated September 19 and 21, 1978, Waterman Steamship Corporation seeks reconsideration in part of the Board's final decision in this proceeding served September 5, 1978. In the first petition, Waterman seeks expedited reconsideration and reversal of the finding that Section 605(c) of the Merchant Marine Act, 1936, as amended (Act), is a bar to proposed privilege calls on Trade Routes (TRs) 6 and 11 in conjunction with required TR 21 service. By the second petition Waterman seeks reconsideration and reversal of the Board's finding that Section 605(c) is a bar (i) to proposed privilege calls on TR 5-7-8-9 in connection with required service on TR 21 and (ii) to required service on TRs 5-7-8-9, 6 and 11. Sea-Land filed answers opposing the petitions. We deny the petitions.

II. TRs 6 AND 11 PRIVILEGE CALLS

In the Board's final decision in this proceeding it was concluded that Waterman failed to show that under the purposes and policy provision of Section 605(c) of the Act its proposed privilege calls on TRs 6 and 11 in connection with TR 21 service would reduce the present and projected U.S.-flag inadequacy of service on those routes. To establish "compelling cause" sufficient to require the Board to reopen its final decision, Waterman must show, that the Board erroneously decided that Section 605(c) barred these proposed privilege calls.[1]

Waterman appears to argue that it presented evidence in the proceeding in the form of a Combination Itinerary and testimony thereon that shows it would regularly carry cargo on

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[1] Under the Board's Rules of Practice and Procedure, "[u]pon petition and a showing of compelling cause . . . the Administration may at any time reopen any proceeding under the regulation in this part for . . . reconsideration in whole or in part." 46 CFR § 201.173. The petitioner is also required to state "the matter claimed to have been erroneously decided" and to specify "the alleged errors." 46 CFR § 201.174.

TR 11 outbound and TR 6 inbound with TR 21 vessels. Waterman also asserts that it had identified the broad range of commodities and the annual tonnage that would be carried on these privilege calls.

Waterman filed two separate applications, one for subsidized service on TRs 5-7-8-9, 6 and 11 and another for subsidized service on TR 21 with privilege calls on TRs 5-7-8-9, 6 and 11. In the hearing it presented three itineraries: an Atlantic Itinerary applicable to service on TRs 5-7-8-9, 6 and 11; a Gulf Itinerary applicable to service on TR 21; and a Combination Itinerary applicable to service on TRs 5-7-8-9, 6, 11 and 21. There is nothing in the record to indicate that the Combination Itinerary is other than an intended, undivisible combination of the Atlantic and Gulf itineraries.[2] Specifically, there is nothing in the record that indicates Waterman would provide service on TRs 6 and 11 with TR 21 vessels if service on TR 5-7-8-9 were not subsidized. Further, with respect to the Atlantic service, Waterman's witness conceded that Waterman had not really thought about a separate contract for TRs 6 and 11 if subsidy on TR 5-7-8-9 were denied (Tr. II-23). On the other hand, with respect to the Gulf service and calls on TRs 6 and 11 there is nothing in the record to suggest that even at the hearing Waterman had considered whether a separate subsidy contract for TR 21 and TRs 6 and 11 would be undertaken if subsidy for TR 5-7-8-9 were denied.

In Docket S-288 the Board found that an applicant who had presented evidence on consolidated services without separation for certain particular routes had for this and other reasons failed to show its proposed service would cure inadequacy.[3] Waterman argues that such decision is distinguishable because in this proceeding Waterman showed it

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[2] For instance, Waterman's witness testified regarding the Combination Itinerary:

> "On the outbound leg the combination itineraries will include two South Atlantic ports such as Jacksonville, Savannah, Charleston and Moorehead City, *and will call at North Atlantic ports such as Baltimore and New York.*" Ex. WS-4 at 5 (Emphasis added.)

[3] American Export Lines, Inc., 14 SRR 1539, 1549 (1975).

would make direct calls on TRs 6 and 11 by its Combination Itinerary. Aside from the crucial difficulty already discussed of Waterman's Combination Itinerary not being divisible, there is the further difficulty for Waterman that it proposes to serve TRs 6 and 11 with both TR 5-7-8-9 vessels and TR 21 vessels and it made no distinction in the record between these services. The Board is not required after the record is closed to decipher the proposed level of service on TRs 6 and 11 with TR 21 vessels as opposed to service on those routes with TR 5-7-8-9 vessels in order to determine if service on TRs 6 and 11 with TR 21 vessels is anything more than de minimis service. The applicant has that burden which it did not carry in this proceeding. We find that our decision in Docket S-288 is controlling and that Waterman failed to show that its privilege calls on TRs 6 and 11 with TR 21 vessels would cure to any material extent inadequacy of U.S.-flag service on TRs 6 and 11 with TR 21 vessels.

III. TR 5-7-8-9 SERVICE

Waterman argues that the Board erred by (i) failing to apply the proper guideline for measuring adequacy/inadequacy of U.S.-flag service under the first clause of Section 605(c); (ii) adopting a new standard for measuring present adequacy/inadequacy without prior notice to Waterman; and (iii) rejecting a container stowage adjustment, as advocated by Waterman, to capacity calculations for the projected U.S. fleet. We will consider all three contentions.

A. Proper Guideline for Adequacy of U.S.-Flag Service

Waterman seems to argue that adequacy of U.S.-flag service is established only if U.S.-flag vessels could carry something in excess of 50% of the liner cargo moving on the route. It charges the Board is in error to find that a U.S.-flag participation of "only 48%" is adequate projected U.S.-flag service on TR 5-7-8-9 as was found in the final decision.

Waterman is wrong as a matter of law. The Secretary of Commerce in the Atlantic Express decision[4] established 50% U.S.-flag participation as an objective. He also stated:

> "[I]n applying this guideline to any given factual situation no particular arithmetical percentage will be deemed per se adequate or per se inadequate; rather, it will be recognized that a U.S. merchant marine service of the highest percentage practically attainable is our goal."[5]

Thus, in appropriate instances, the Board has found projected U.S.-flag participation in excess of 50% to be inadequate, as Waterman notes, and less than 50% to be adequate, as Sea-Land notes. It is a matter for decision in each instance based on the evidence of record.

Waterman maintains that introduction of the only U.S.-flag RO/RO capacity on TR 5-7-8-9 by Waterman would improve U.S.-flag participation on the route because of the greater versatility of the RO/RO type vessels in cargo carriage and port coverage. Given the projected approximate 48% U.S.-flag participation, the Board was not and is not persuaded that the mere introduction of more versatile ships will necessarily result in greater U.S.-flag participation on this route. The RO/RO type vessels will have to compete for virtually the same cargo as container operators on this route in which 90-95% of all commercial cargo moving is containerizable.[6] There is unsufficient evidence that any carriage Waterman may accomplish with the increased versality of the RO/RO vessels on the route would result in a net gain of U.S.-flag participation rather than a mere redistribution. We conclude that we used the proper standard for determining adequate/inadequate U.S.-flag service, and properly applied that standard on the record in this proceeding.

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[4] Atlantic Express Lines of America, Inc., 1 MA 104 [2 SRR 725] (1963).

[5] *Id.* at 110.

[6] Ex. SL-18 at 18.

B. Present Inadqeuacy/Adequacy

In the past, the Board determined present inadequacy/adequacy of U. S.-flag service based on "the historical level of U. S.-flag participation." [7] In the final decision the Board found that "present" U. S.-flag participation on TR 5-7-8-9 was 61% without Waterman based on the Chief Administrative Law Judge's (CALJ's) calculation of cargo and capacity to which no party took exception (p. 27).

Waterman now argues that it had no need to take an exception as the CALJ's finding was favorable. It continues that once the Board rejected the CALJ's finding of low utilization the Board should have rejected his methodology for calculating present inadequacy.

We are not persuaded that this exception would materially change the result of the Board's final decision, even if we were to agree with the result of Waterman's arguments. Waterman is seeking a 20-year subsidy contract and not a one-year contract. A projected determination for 1980 has more probative value in this proceeding than a "present" finding for 1973 (33%) or even 1976 (32%).

Further, we believe Waterman should be held to its failure to except to the CALJ's method of calculating present inadequacy. The method of determining present inadequacy was just as novel when proposed by the CALJ as it was when followed by the Board, except that we disagreed with some of the numbers to be used in the calculation. Whether or not this approach will be followed in future decisions is a matter for determination at that time. As we understand the CALJ's calculations, he was attempting to construct "present" adequacy/inadequacy as of 1977 from the evidence of record and made the assumption that the 1980 projected fleet capacity would be applicable to 1977 and that the 1973 cargo pool could reasonably be extended to 1977. There is insufficient evidence of record to substantiate that the assumptions employed in the calculations were unreasonable.

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[7] Waterman Steamship Corporation, 16 SRR 1357, 1360 (MSB 1967); see also Additional Subsidized Service on Trade Routes 29 and 17, 14 SRR 387, 398-99 (MSB 1976).

C. Container Stowage

The Board in its final decision followed the CALJ's findings of a 2.81 container stowage factor on TR 5-7-8-9 inbound and rejected Waterman's arguments that a container stowage factor of 4.08 would be proper for the route. Waterman now maintains that an average factor of 3.64 ML/LT (measurement tons/long tons) on the route is proper for the three U. S.-flag operators. Waterman argues that its expert witness, Mr. Rifas, used factors, which, when properly calculated, resulted in a 3.64 container stowage factor; that Mr. Rifa's prepared testimony did not have the advantage of later discovered information which confirmed the 3.64 factor; that Mr. Rifa's container stowage factor exceeded the CALJ's density factor; and that Sea-Land's experience of 1.9 MT/LT on TR 5-7-8-9, relied on by the Board, reflected a cube-to-weight ratio and not a container stowage factor.

Quite simply, Waterman through its counsel's petition continues to attempt to impeach its own expert testimony of the container stowage factor on the route by conjuring up a different container stowage factor from underlining data used by the expert based on unknown facts and unproven assumptions. Mr. Rifas never testified that the container stowage factor on TR 5-7-8-9 inbound was 3.64 MT/LT. He testified through prepared testimony that the factor was 2.41 (Ex. WS-5, Table II-4), and that such stowage factor included an allowance for broken stowage (Ex. WS-5, p. II-5). To the extent that such factor was based on Waterman's experience in loading Mariner class vessels, it is noted that Mr. Rifas used a 10% adjustment to convert breakbulk stowage to container stowage factor (Ex. WS-5, p. V-5), and the Board's container stowage factor of 2.81 exceeded by more than 10% Mr. Rifas' 2.41 factor.[8] Further, the reasonableness of the 2.81 factor is confirmed by Sea-Land's actual experience on the North Atlantic trade of an overall cube/weight ratio of 1.9 MT/LT (Ex. SL-18, pp. 21-22). The difference between the cube/weight

[8] It is not at all clear from the record that the 10% adjustment from breakbulk stowage to container stowage is not already reflected in the 2.41 MT/LT factor. There was no testimony on this issue of which we are aware.

ratio and container stowage is broken stowage, which would have to approach an incredible 100% to substantiate the advocated 3.64 factor.

Moreover, Waterman's calculation of a 3.64 MT/LT container stowage factor relied on Mr. Rifas' estimate of a factor of 8 LT/TEU (long ton/twenty foot equivalent units) for Sea-Land and 7.31 LT/TEU for United States Lines, Inc. and American Export Lines, Inc. Mr. Rifas seemed to acknowledge that these numbers were based on Waterman's experience in the Gulf (Tr. II-87-88) and in any event they were based on certain estimates of an average container load not of record (Ex. WS-5, p. V-5). The most fundamental difficulty, however, with the 3.64 derived factor is its irreconcilable conflict with Mr. Rifas' stated estimate of 2.41 MT/LT.

IV. REQUIRED SERVICE ON TRs 6 AND 11

Waterman proposed to provide service on TRs 6 and 11 as an integrated part of required service on TR 5-7-8-9. It does not propose to operate vessels exclusively on TRs 6 and 11. Since we continue to find that Section 605(c) is a bar to privilege or required service on TR 5-7-8-9 as requested by Waterman, we need not and do not reach its argument as to required service on TRs 6 and 11 with TR 5-7-8-9 vessels.

V. CONCLUSION

For the foregoing reasons, we deny petitions of Waterman, dated September 19 and 21, 1978, for reconsideration of the Board's final decision in this consolidated proceeding, served September 5, 1978, to the extent that it was determined that Section 605(c) barred Waterman's application for (i) subsidized required service on TRs 5-7-8-9, 6 and 11; and, (ii) subsidized privilege service on TRs 6 and 11 in connection with required TR 21 service.

APPENDIX E

Maritime Subsidy Board
No. A-129

WATERMAN STEAMSHIP CORP.

In the matter of petition of Sea-Land Service, Inc., dated December 11, 1978, and letter of counsel for Farrell Lines Incorporated, dated December 12, 1978, for reopening and reconsideration of action by the Maritime Subsidy Board on November 21, 1978, for, among other things, approving unsubsidized operations by Waterman Steamship Corporation on Trade Routes 5-7-8-9, 6 and 11 under Contract No. MA/MSB-450.

Decided: January 19, 1979
Served: January 19, 1979

ORDER DENYING REQUESTS FOR REOPENING

Robert J. Blackwell, Chairman; Samuel B. Nemirow, Member; and C. G. Caras, Member.

Edward M. Shea, Esq., and Gary R. Edwards, Esq., Ragan & Mason, counsel for Sea-Land Service, Inc.

Edward Aptaker, Esq., Schmeltzer, Aptaker & Sheppard, counsel for Farrell Lines Incorporated.

Robert A. Peavy, Esq., and Karol Lyn Newman, Esq., Morgan, Lewis & Bockius, counsel for Waterman Steamship Corporation.

I. INTRODUCTION

Sea-Land Service, Inc. (Sea-Land) on December 11, 1978, filed a petition for reopening and reconsideration of the Board's action on November 21, 1978, approving an application of

Waterman Steamship Corporation (Waterman) for operating-differential subsidy (ODS) on Trade Routes (TR) No. 21, with the privilege of providing certain unsubsidized operations on TR's 5-7-8-9, 6 and 11, Sea-Land also requested a hearing under Section 605(c) of the Merchant Marine Act, 1936, as amended (Act). Farrell Lines Incorporated (Farrell), by letter of counsel dated December 12, 1978, requested the Board (i) to vacate the above action, apparently to the extent it permitted Waterman to provide "unlimited" "unsubsidized" top off service on TR 5-7-8-9 with TR 21 vessels and "unlimited," "independent," "unsubsidized" voyages on TR 5-7-8-9; (ii) to vacate any contract executed pursuant to such approval; and (iii) to afford Farrell a hearing with respect to Waterman's application of September 18, 1978.

Waterman filed an answer to these requests asking the Board to summarily deny the requests or promptly deny them on the merits, Waterman claims that the requests are untimely; that the Board's November 21, 1978, action was not contrary to the Board's Final Opinion and Order [18 SRR 925] and Order Denying Reconsideration [18 SRR 1257] in Dockets S-421 and S-455; and that the Board's action of November 21, 1978, was not contrary to Section 605(c) of the Act. Farrell filed a brief reply pressing its requests.

We deny the requests for reopening as discussed below.

II. TIMELINESS

The Board's action was taken on November 21, 1978, and its letter of notification was so dated. Sea-Land's petition was filed 20 days later after 5:00 P.M. while Farrell's letter was filed 21 days after the Board action. Waterman argues that the filings were not authorized by the Board's Rules of Practice and Procedure, were after the 10 days permitted under Department of Commerce Organizational Order (DOO) 10-8, and were after the date established by Board precedent for filing petitions for reconsideration of non-hearing matters. Waterman adds that because the Sea-Land and Farrell requests are so drasti-

cally prejudicial to Waterman and so clearly devoid of substantive merit as well as untimely the Board should summarily deny the petitions.

The Board's Rules of Practice and Procedure as to specifying 20 days for petitions for reopening apply only to "proceedings," that is matter involving a hearing.[1] In the absence of any requirement in the rules for filing a petition for non-hearing matters, the Board as a matter of practice has permitted such petitions, "if the petition is timely filed and compelling reason is shown for reopening."[2] Twenty days within service date of an action is clearly reasonable time for filing such petitions, since that is the rule for hearing matters.

Farrell maintains that it first became aware of the Board's November 21, 1978, action the next day from press reports. Sea-Land does not indicate when it first became aware of the Board's action but no actual service was made on Sea-Land on November 21st. Both Sea-Land and Farrell filed within 20 days of November 22nd and therefore their filings were timely.

Waterman is incorrect that Board precedents establish a 10 day deadline for filing petitions to reopen non-hearing matters as contemplated under Section 7.03 of DOO 10-8. Two of the decisions cited did not technically reach that issue.[3] The third decision, while precisely on point, was later reversed with the Board concluding that a Sea-Land petition for reconsideration filed 20 days after a Board action on non-hearing matters "conformed to existing procedural requirements."[4]

We agree that Sea-Land's and Farrell's requests, if granted, would be drastically prejudicial to Waterman. That fact,

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[1] E.g., American President Lines, Ltd., 16 SRR 472, 474 (MSB 1965).

[2] Lykes Bros. Steamship Co., Inc., 16 SRR 465, 468 (MSB 1965).

[3] Lykes Bros. Steamship Co., Inc., 16 SRR 465, 468 (MSB 1965); American President Lines, Ltd., 16 SRR 472, 474 (MSB 1965). Further, unlike those matters, there is no contractual commitment here with Waterman unless the Board's action became final "without amendment," as explained infra. Also, unlike those matters, the petitioners herein were not previously on record as to their views on the complained of Board action.

[4] AEIL—CDS to Convert Oil Carriers, 2 MA 668, 669 [6 SRR 467] (MSB 1965). This decision is inconsistent with later Board decisions as to the scope of the Board's rules on petitions for reopening.

however, is not relevant to determining the legal issue of whether the requests for reopening are timely. We hold that they are.

III. GOOD CAUSE FOR REOPENING

Sea-Land and Farrell press two major arguments as grounds for reopening the Board's action of November 21, 1978. The first argument is that the Board's approval of the unsubsidized operations on TR's 5-7-8-9, 6 and 11 involves leakage of subsidy and therefore is contrary to the Board's Final Opinion and Order and Order on Reconsideration in Docket S-421/455 which found that Section 605(c) of the Act barred approving any Waterman subsidized operations on those routes. The second argument is that Waterman's amended application of September 1978 and later was for service in addition to existing service and under Section 605(c) of the Act could not be approved without Federal Register notice and extending an opportunity to be heard to competitor U.S.-flag carriers. In short, they argue the Board was in error.

The Board was well aware of these issues when it considered and undertook the actions on November 21, 1978. Neither Sea-Land nor Farrell raise any new issue that was not anticipated and rejected by the Board in its deliberations. We find no basis therefore for reconsidering our action.

IV. CONCLUSION

For the foregoing reasons, the Board denies Sea-Land's and Farrell's requests, by petition dated December 11, 1978, and letter dated December 12, 1978, for reopening of Board action of November 21, 1978, and for related relief but finds that such requests were timely filed.

APPENDIX F

ORDER

In the Matter of: Unsubsidized Operations by Waterman Steamship Corporation on Trade Routes 5-7-8-9, 6 and 11 Under Contract No. MA/MSB-450 (MSB Docket No. A-129)

The petitions for review of the Maritime Subsidy Board decision have been considered and are hereby denied.

SO ORDERED

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Acting Under Secretary
of Commerce

Dated: February 15, 1979

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-1100

SEA-LAND SERVICES, INC.,
Plaintiff

v.

ANDREW L. LEWIS, JR.*
Secretary of Transportation,

HAROLD E. SHEAR,
Maritime Administrator and Chairman, Maritime Subsidy Board,

WARREN G. LEBACK,
Member, Maritime Subsidy Board,

LEONARD E. DICKSTEIN,
Member, Maritime Subsidy Board,

MARITIME SUBSIDY BOARD
and
WATERMAN STEAMSHIP CORPORATION,
Defendants.

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* Since this action was initiated, the Maritime Subsidy Board has been transferred from the Department of Commerce to the Department of Transportation. In accordance with Fed. R. Civ. P. 25(d), Andrew L. Lewis, Jr., Secretary of Transportation, has been substituted for Juanita M. Kreps, Secretary of Commerce, as defendant to this action and Harold E. Shear has replaced Robert J. Blackwell as defendant in the capacities of Maritime Administrator (formerly Assistant Secretary of Commerce for Maritime Affairs) and Chairman, Maritime Subsidy Board. Warren G. Leback and Leonard E. Dickstein have been substituted for Samuel E. Nemirow and C.G. Caras in their capacities as members of the Maritime Subsidy Board. The original defendants were sued in their individual capacities, but to the extent that the complaint was brought against the defendants as individuals, the Court finds no basis for maintaining the action and it is hereby dismissed.

MEMORANDUM OPINION AND ORDER

This case comes before the Court for consideration of federal defendants' motion for judgment on the pleadings, defendant-intervenor's motion to dismiss, and plaintiff's motion for summary judgment. As information outside the pleadings has been considered by the court, all defendants' motions will be treated as motions for summary judgment pursuant to Fed. R. Civ. F. 12(c) and 12(b)(6). The interests of all defendants to this action are identical, and therefore their separate motions may be consolidated here.

The issue presented by this case is whether the decision of defendant Maritime Subsidy Board ("Board") permitting defendant-intervenor Waterman to conduct nonsubsidized shipping operations along certain trade routes between North America and Europe as an adjunct to its subsidized operations along Trade Route 21 (TR 21) between the United States Gulf and Europe required a prior hearing under the relevant statutes. Plaintiff brings this action under the Administrative Procedure Act and §§ 601 and 605(c) of Title VI of the Merchant Marine Act of 1936, as amended.

Section 601 of the Merchant Marine Act ("the Act") states in pertinent part that

> "The Secretary of Commerce is authorized and directed to consider the application of any citizen of the United States for financial aid in the operation of a vessel or vessels, which are to be used in an essential service in the foreign commerce of the United States . . ." 46 U.S.C. § 1171.

The purpose of the operating-differential subsidies (ODS) authorized in § 601 is "to put the American-flag owner on a parity with his foreign competitor." *Moore-McCormack Lines, Inc. v. United States,* 431 F.2d 568, 571 (Ct. Cl. 1969). The subsidies are made available to further the policies of the Merchant Marine Act, set forth in 46 U.S.C. § 1101 (1970):

> "It is necessary for the national defense and development of its foreign . . . commerce that the United States shall have a merchant marine (a) sufficient to

> carry . . . a substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping service essential for maintaining the flow of such . . . foreign water-borne commerce at all times, (b) capable of serving as a naval and military auxiliary in time of war or national emergency . . ."

Section 605(c) of the Act limits the availability of ODS awards as follows:

> "No contract shall be made under this subchapter [which subchapter is captioned 'Operating-Differential Subsidy'] with respect to a vessel to be operated in an essential service served by citizens of the United States which would be in addition to the existing service or services, unless the Secretary of Commerce shall determine after proper hearing of all parties that the service already provided by vessels of United States registry is inadequate, and that in the accomplishment of the purposes and policy of this chapter additional vessels should be operated thereon." 46 U.S.C. § 1173(c).

Clearly, the Act mandates a hearing to determine the adequacy of existing shipping service before approval of a subsidy award to a shipper in essential foreign commerce. The question raised here is whether this hearing requirement applies to a modification to an approved application for subsidized service, where the modification proposes additional nonsubsidized service along trade routes on which approval of subsidized service has been denied. On November 21, 1978, without first conducting a hearing, the Board decided to approve such an application submitted by Waterman. A brief chronology of the events leading up to that decision will set the stage for discussion of this issue.

On August 17, 1973, defendant-intervenor Waterman applied to the Board for ODS to subsidize shipping operations on TR 21 between the United States Gulf and Europe. Two years later Waterman filed a separate application for an ODS award

to cover operations on TRs 5-7-8-9, 6 and 11, between the North and South Atlantic off the United States coast and Europe. Plaintiff Sea-Land operates ships on the North and South Atlantic routes but does not compete with Waterman on TR 21. Both of Waterman's applications were ordered to a hearing before an Administrative Law Judge, in accordance with § 605(c) of the Merchant Marine Act. Following the hearing, on September 3, 1978 the Board denied Waterman's application for subsidy on TRs 5-7-8-9, 6 and 11, finding that service on route 5-7-8-9 was adequate without an additional subsidized shipper and that Waterman had failed to show that its proposed subsidized operations on lines 6 and 11 would further the purposes of the Act. The Board did grant an award of ODS to cover Waterman's operations on TR 21. Waterman petitioned the Board for reconsideration of the decision to deny subsidy on TRs 5-7-8-9, 6 and 11, but those petitions were denied on November 16, 1978.

Before filing its petitions for reconsideration, Waterman had submitted to the Board a modification to its TR 21 application detailing proposed revisions to its service on that route. The proposed amendments would allow Waterman the "privilege of calling at Atlantic Coast ports of the United States on a nonsubsidized deviation basis to load and discharge cargo." The Board approved this revision to the application on November 21, 1978.

Sea-Land unsuccessfully petitioned for reconsideration of that decision and now argues before this Court that the November 21, 1978 approval of Waterman's contract is not in accordance with the law in that it 1) conflicts with the board's determination of September 5, 1978, 2) violates the hearing requirements of the Administrative Procedure Act and § 605(c) of the Merchant Marine Act, 3) fails to contain factual findings required by §605(c) as to the adequacy of existing service and 4) results in either a subsidized combination of Gulf/North Atlantic/South Atlantic service or wholesale leakage of subsidy from TR 21 to TRs 5-7-8-9, 6 and 11. (Complaint at 6-7).

For a grant of summary judgment, there must be no material factual issues in dispute between the parties. Fed. R. Civ. P. 56(c). Although both plaintiff and Waterman claim that they dispute issues of fact material to the opposing side's theory of the case, we find that the only material facts in dispute involve the findings of the Board's Final Opinion and Order of September 5, 1978. Plaintiff's pleadings state that "the [Board's] November 21 determination conflicts with the Board's findings in its Final Opinion and Order . . . in which the Board held, *inter alia,* that the Waterman application therein was barred by Section 605(c) insofar as it proposed operations on TRs 5-7-8-9, 6 and 11." (Complaint at 17a.) This statement and plaintiff's assertion that "the Board implicitly found that Section 605(c) was a bar to any and all service by Waterman on TRs 5-7-8-9, 6 and 11" (Plaintiff's Memo, p.8) are challenged by Waterman, which claims that "the Board found that Section 605(c) bars a 'grant of ODS' " for Waterman's operations and that "the Board does not 'bar service' and it made no implicit or explicit finding to this effect."

The relevant language of the Final Opinion and Order states that "Section 605(c) is a bar to grant of the requested subsidy on TRs 5-7-8-9, 6 and 11" (Appendix B to Attachment A to Plaintiff's Memo.) In its denial of reconsideration of the September 5, 1978 order, the Board explained further that "It was determined that Section 605(c) barred Waterman's application for *subsidized* required service on TRs 5-7-8-9, 6 and 11 and *subsidized* privilege service on TRs 6 and 11 in connection with the required TR 21 service." (Appendix C to Attachment A to Plaintiff's Memo.) (emphasis added). On the basis of these statements in the record before us, we take notice of the fact that the Board's order of September 5, 1978 did not bar *nonsubsidized* shipping operations by Waterman on TRs 5-7-8-9, 6 and 11. Therefore, no material facts remain in dispute. Furthermore, on the basis of these facts, the plaintiff's first asserted basis for its cause of action lacks merit because the Board's November 21, 1978 decision does not conflict with its earlier findings and order.

We turn now to the next asserted basis for plaintiff's cause of action: the statutory requirements of § 605(c) of the Merchant Marine Act. Both the federal defendants and Waterman argue that § 605(c) affords no protection to plaintiff because that section of the Act governs subsidized operations only and has no bearing on a decision to permit nonsubsidized shipping operations, even as an adjunct to subsidized service.

The plaintiff points out, rather ineffectively, that "the language of Section 605(c) does not mention at all the payment of subsidy." (Memo at p. 4). Clearly, § 605(c) cannot be lifted from the context of the paragraphs surrounding it. Not only do Sections 605(a) and 605(b) speak in terms of subsidy payments and financial aid, but Section 605(c) itself states that it relates to contracts made "under this subchapter," and the subchapter is entitled "Operationing—Differential Subsidy." We are satisfied that the provisions of § 605(c) govern only those shipping operations for which the Board is considering granting ODS aid.

Plaintiff argues that § 605(c) should apply to Waterman's proposals for nonsubsidized service on TRs 5-7-8-9, 6 and 11 because the inclusion of these routes in Waterman's service constitues a material amendment to its TR 21 application. Plaintiff contends that *Sea-Land Service, Inc. v. Connor,* 413 F.2d 1142 (D.C. Cir. 1969) is dispositive of this question, as in that case a material amendment to an earlier application was cause for a § 605(c) hearing. However, *Connor* does not control this situation. In *Connor,* the defendant shipper's earlier application requested subsidy to operate break-bulk vessels, and its later "amendment" was for expanded operations which included the first fully containerized steamship service in the foreign commerce of the United States. Nonetheless, the court found that the second application was more than a mere amendment to the first—it was "a new application (which) called for subsidy of a service that would be 'in addition to the existing service'" (418 F.2d at 1148.) Noting that "the Merchant Marine Act of 1936 . . . calls for notice and hearing where either the proposed *subsidized* service is 'in addition to the existing service' . . ., *Connor* at 1147 (emphasis added) or

where 'the effect of the contract of *subsidy* would be unduly prejudicial to competition,' *Connor* at 1148 (emphasis added), the court held that the second application could not be approved without notice and hearing. The court concluded its opinion by admonishing that "in passing upon the applications for contracts of government subsidy, . . . it is incumbent upon the Secretary [of Commerce] to follow sound administrative procedures to determine the necessity of expenditures and thereby serve the master, public interest." (*Id.* at 1149.) Clearly, neither the language nor the policies of *Connor* support plaintiff in this case where subsidies are neither requested nor granted. Whether Waterman's second application should be considered a new application or a revision or amendment to the TR 21 application is immaterial—the relevant fact is that Waterman sought *no* subsidy for the privilege of making calls at ports on TRs 5-7-8-9, 6 and 11. This being so, the requirements of § 605(c) are not called into play.

Plaintiff attempts to characterize Waterman's operations on TRs 5-7-8-9, 6 and 11 as quasi-subsidized by asserting that "the Board's action results in either (a) a subsidized combination Gulf/North Atlantic/South Atlantic service or (b) wholesale leakage of subsidy from TR 21 to TR 5-7-8-9, 6 and 11." (Complaint p. 7) Plaintiff contends that the grant of subsidy by the Board to Waterman has furnished Waterman the wherewithal to serve TRs 5-7-8-9, 6 and 11, albeit indirectly, and it urges the Court to consider that "in every realistic sense, subsidy is in fact being paid for the operation of [Waterman's] vessels on the North Atlantic routes." (Plaintiff's Memo at p.12).

Plaintiff's argument, although intuitively sensible, will not support a cause of action under § 605(c). In drafting that section of the Act, Congress provided no mechanism to protect shippers in foreign commerce from "subsidy leakage", or the indirect flow of benefits from a shipper's subsidized operations to its nonsubsidized foreign operations. Had Congress intended to provide such protection, it clearly knew how to do so, as evidenced by § 805(a) of the Act, which makes it a misdemeanor to divert money or property used in subsidized

foreign operations into nonsubsidized *domestic* operations. Apparently recognizing the weakness of its argument for protection against subsidy leakage under § 605(c), plaintiff concedes that the existence or lack of existence of subsidy leakage is not dispositive of the fundamental issue in this case—that is, plaintiff's claimed right to a hearing (Plaintiff's Memo, p. 11). Plaintiff now takes the position that assertions of subsidy leakage were included in the complaint "only to establish that actual economic injury . . . did occur to Sea-Land as a result of the Board's action" (*Id.* at 3). Yet, any claims of economic injury are irrelevant to this action for a hearing under § 605(c) absent a showing of a plaintiff's statutory right to a hearing prior to the Board's approval of Waterman's amended application, and plaintiff has failed to make that showing.

Because plaintiff has not shown that it has a procedural right to a hearing in this matter under § 605(c), its attempts to maintain this action under the Administrative Procedure Act (APA) (5 U.S.C. § 531 *et seq.*) must also fail for lack of standing. Plaintiff could establish standing under the APA only by reflecting that it is "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." (5 U.S.C. § 702). The question of standing under the APA concerns "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute . . . in question," *Association of Data Processing Service Org., Inc. v. Camp,* 397 U.S. 150, 154 (1970), and the plaintiff must allege that the challenged action has caused him injury in fact, (*Id.* at 153). Even had plaintiff had averred some injury in fact (apart from speculated loss in profits which may result from the increased competition on TRs 5-7-8-9, 6 and 11), plaintiff cannot show that it is arguably within the zone of interest protected by § 605(c), as that statute does not seek to protect shippers from nonsubsidized competition.

Because plaintiffs have not shown that defendant-intervenor Waterman's amended application proposing nonsubsidized service along TRs 5-7-8-9, 6 and 11 in addition to its approved subsidized service on TR 21 requires a hearing under Section 605(c) of the Merchant Marine Act, and because the plaintiff lacks standing to bring this action under the Administrative Procedure Act, defendants are hereby granted judgment as a matter of law.

An appropriate judgment accompanies this memorandum opinion.

.....

JOYCE HENS GREEN
United States District Judge

April 27, 1982

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-1100

SEA-LAND SERVICES, INC.,
Plaintiff

v.

ANDREW L. LEWIS, JR.
Secretary of Transportation,

HAROLD E. SHEAR,
Maritime Administrator and Chairman,
Maritime Subsidy Board,

WARREN G. LEBACK,
Member, Maritime Subsidy Board,

LEONARD E. DICKSTEIN,
Member, Maritime Subsidy Board,

MARITIME SUBSIDY BOARD

and

WATERMAN STEAMSHIP CORPORATION,
Defendants.

JUDGMENT

In accordance with the Memorandum Opinion filed this date, it is, by the Court, this 27th day of April, 1982, hereby

ORDERED, that Juanita M. Kreps, Robert J. Blackwell, Samuel B. Nemirow, and C. G. Caras are dismissed from this action in their official capacities and are replaced in their official capacities by defendants Andrew L. Lewis, Jr., Secretary of Transportation; Harold E. Shear, Chairman, Maritime Subsidy Board; Warren G. Leback, Member, Maritime Subsidy Board; and Leonard E. Dickstein, Member, Maritime Subsidy Board, and it is

FURTHER ORDERED, that this cause stands dismissed as against Andrew L. Lewis, Jr., Harold E. Shear, Warren G. Leback, and Leonard H. Dickstein in their individual capacities, and it is

FURTHERED ORDERED, that summary judgment be entered in favor of defendants Andrew L. Lewis, Jr., Harold E. Shear, Warren G. Leback and Leonard E. Dickstein in their official capacities, the Maritime Subsidy Board and Waterman Steamship Corporation, and against plaintiff Sea-Land Services, Inc.

.....

JOYCE HENS GREEN
United States District Judge

APPENDIX H

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983
Civil Action No. 79-01100

No. 82-1712

SEA-LAND SERVICE, INC.,
Appellant

v.

ELIZABETH HANFORD DOLE,
SECRETARY OF TRANSPORTATION, ET AL.

Appeal from the
United States District Court
for the District of Columbia

Before: EDWARDS, BORK and SCALIA, *Circuit Judges*

JUDGMENT

THIS CAUSE came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION THEREOF it is ordered and adjudged by this Court that the judgment _____ of the District Court appealed from in this cause is hereby affirmed, in accordance with the opinion of this Court filed herein this date.

Per Curiam For The Court

.....

GEORGE A. FISHER
Clerk

Date: December 23, 1983
Opinion for the Court filed by Circuit Judge Scalia.

A true copy:
Test: GEORGE A. FISHER
United States Court of Appeals
for the District of Columbia Circuit

..... *Deputy Clerk*

APPENDIX I

U.S. CODE

TITLE 46.—SHIPPING

§ 1175. Vessels excluded from subsidy.

(a) Vessels engaged in coastwise or intercoastal trade; vessels on inland waterways.

No operating-differential subsidy shall be paid for the operation of any vessel on a voyage on which it engages in coastwise or intercoastal trade: *Provided, however,* That such subsidy may be paid on a round-the-world voyage or a round voyage from the west coast of the United States to a European port or ports or a round voyage from the Atlantic coast to the Orient which includes intercoastal ports of the United States or a voyage in foreign trade on which the vessel may stop at the State of Hawaii, or an island possession or island territory of the United States, and if the subsidized vessel earns any gross revenue on the carriage of mail, passengers, or cargo by reason of such coastal or intercoastal trade the subsidy payment for the entire voyage shall be reduced by an amount which bears the same ratio to the subsidy otherwise payable as such gross revenue bears to the gross revenue derived from the entire voyage. No vessel operating on the inland waterways of the United States shall be considered for the purposes of this chapter to be operating in foreign trade.

(b) Vessels more than 25 years old.

No operating-differential subsidy shall be paid for the operation of a vessel that is more than twenty-five years of age unless the Secretary of Commerce finds that it is to the public interest to grant such financial aid for the operation of such vessel and enters a formal order thereon, and the Secretary shall include in each annual report a full report covering each case in which such exception is made, with the reasons therefor.

(c) Vessels to be operated in an essential service served by citizens of the United States.

No contract shall be made under this subchapter with respect to a vessel to be operated in an essential service served by citizens of the United States which would be in addition to the existing service, or services, unless the Secretary of Commerce shall determine after proper hearing of all parties that the service already provided by vessels of United States registry is inadequate, and that in the accomplishment of the purposes and policy of this chapter additional vessels should be operated thereon; and no contract shall be made with respect to a vessel operated or to be operated in an essential service served by two or more citizens of the United States with vessels of United States registry, if the Secretary of Commerce shall determine the effect of such a contract would be to give undue advantage or be unduly prejudical, as between citizens of the United States, in the operation of vessels in such essential service unless following public hearing, due notice of which shall be given to each operator serving such essential service, the Secretary of Commerce shall find that it is necessary to enter into such contract in order to provide adequate service by vessels of United States registry. The Secretary of Commerce in determining for the purposes of this section whether services are competitive, shall take into consideration the type, size, and speed of the vessels employed, whether passenger or cargo, or combination passenger and cargo, vessels, the ports or ranges between which they run, the character of cargo carried, and such other facts as he may deem proper. (June 29, 1936, ch. 858, §§ 605, 905(e), 49 Stat. 2003; 1950 Reorg. Plan No. 21, §§ 105(1), 306, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1274, 1275, 1277; July 17, 1952, ch. 939, §§ 15, 21, 66 Stat. 764, 765; Mar. 18, 1959, Pub. L. 86-3, § 18(b)(2), 73 Stat. 12; June 12, 1960, Pub. L 86-518, § 1, 74 Stat. 216; 1961 Reorg. Plan No. 7, eff. Aug. 12, 1961, 26 F.R. 7315, 75 Stat. 840; Oct. 21, 1970, Pub. L. 91-469, §§ 18, 19, 26(b), 35(a), (j), 84 Stat. 1025, 1026, 1034-1036.)

APPENDIX J

CODE OF FEDERAL REGULATIONS

TITLE 46—SHIPPING

NONSUBSIDIZED VOYAGES

Source: General Order 80, 22 FR 2911, Apr. 25, 1957, unless otherwise noted.

§ 281.11 Scope and general comments.

(a) Except as provided below, §§ 281.11 to 281.17 apply to nonsubsidized voyages to be made by a subsidized operator or by a related company, as referred to in Article II-16 of the operating-differential subsidy agreements. Except as provided below it also applies to non-subsidized voyages of subsidized ships.

(b) Sections 281.11 to 281.17 do not apply to: (1) Nonsubsidized voyages specifically authorized by the operating-differential subsidy contract of the operator and nonsubsidized voyages by subsidized ships in the subsidized services of the operator, which voyages will be acted on under the provisions of the operator's operating-differential subsidy agreement; or (2) nonsubsidized voyages in services that have not been determined to be essential as provided in section 211, Merchant Marine Act, 1936, as amended, by a nonsubsidized ship operated by a nonsubsidized company related to a subsidized operator.

(c) Sections 281.11 to 281.17 apply to the following categories only to the extent indicated:

(1) Charters to the Military Sea Transportation Service or to a nonsubsidized operator—paragraphs (a) and (e) of this section; §§ 281.12(a)(6) and (b); 281.15(b); 281.16(a), (b), (c), and (f); and 281.17.

(2) Nonsubsidized voyages by nonsubsidized ships (other than those excluded under paragraph (b) of this section) in a service where there are no U.S.-flag berth sailings by other operators—paragraphs (a), (e), and (f) of this section; §§ 281.12(a); 281.15; 281.16(a), (b), (c), (e), and (f); and 281.17.

(3) Ships chartered from the Maritime Administration—§ 281.16.

(d) Except as otherwise determined by the Maritime Administrator, application by a subsidized operator to make a nonsubsidized voyage on a route, line or service on which U.S.-flag berth service is maintained but on which the applicant does not maintain a berth operation will not be approved unless the applicant has requested and furnished the written consent of such operator(s) of the U.S.-flag berth service(s). Failure of other operator(s) of U.S.-flag berth service(s) to protest or consent to a nonsubsidized voyage within 2 working days, Saturdays, Sundays, and legal holidays excluded (one working day in the case of single voyage charters for the carriage of bulk cargoes) after notification may be interpreted by the Maritime Administrator as consent to such voyage. Such consent will not be required from any U.S.-flag berth operator who is employing any U.S. Government-owned ship(s) competitively in such route, line, or service under charter pursuant to Public Law 591, 81st Congress.

(e) Responsibility for compliance with §§ 281.11 to 281.17 shall rest on the subsidized operator regardless of whether he is owner, operator, or charterer of the ship involved.

(f) "U.S.-flag berth operator" as used in §§ 281.11 to 281.17 means an operator rendering on the given route, line, or service an exclusively U.S.-flag service maintaining a definite advertised schedule, giving relatively frequent sailings at regular intervals between specific United States ports or range and designated foreign ports or range.

(g) For the purposes of §§ 281.11 to 281.17, competition shall be deemed to exist between the proposed nonsubsidized voyage and voyages of other U.S.-flag berth operators in the event the nonsubsidized voyage operates in the same route, line, or service as regularly scheduled voyages by such other operators, whether or not the respective itineraries cover identical ports or follow the same order of port calls. Generally, the test will be whether the proposed nonsubsidized voyage will provide a service of the type which would be competitive under the considerations of section 605(c) of the 1936 Act.

§ 281.12 Application for nonsubsidized voyages.

(a) Unless a shorter period is acceptable to the Maritime Administrator, application must be filed not less than five working days, excluding Saturdays, Sundays, and legal holidays (two working days in the case of single voyage charters for the carriage of bulk cargoes) prior to the date by which the operator requires action thereon, accompanied by the following data:

(1) Name of vessel and date by which decision on application is required.

(2) Statement showing why the voyage is needed, why it will not prejudice other sailings of applicant, and what effect the results will have on the Government's recapture position.

(3) Nature and amounts of anticipated cargo (indicating the approximate amounts of MSTS, bulk commercial and other commercial cargo, separately) on the proposed nonsubsidized voyage, outbound and inbound, by principal loading and destination ports. If no inbound cargo is indicated, the operator shall not, in the event of approval of its application, lift inbound cargo unless and until it secures the approval of the Maritime Administration pursuant to an application filed in accordance with the procedure specified in §§ 281.11 to 281.17.

(4) Proposed sailing schedule for the voyage for which approval is requested, including estimated total voyage days.

(5) Pro forma financial results of said voyage including all charges for overhead (showing basis for allocation thereof), depreciation and interest, and all other applicable items.

(6) If the nonsubsidized voyage is to be made with a chartered vessel, or if charters are made to MSTS or a nonsubsidized operator—name and type of vessel, from whom or to whom chartered, type and period of charter, charter hire rate, range of ports, and other pertinent charter terms.

(b) In the case of charter of a subsidized ship between subsidized operators, the charterer shall furnish the required data, and the owner shall furnish to the Maritime Administration a certification that it will adequately service its subsidized route and meet its contractual sailing requirements without the utilization of the subsidized vessel for the period of proposed charter. Also, in the case of charter of a subsidized ship to MSTS or to a nonsubsidized operator, the owner shall furnish the certification described above. The owner shall also file such application as may be required under other provisions of the law or contract, such as where section 805(a) of the 1936 act is applicable.

§ 281.13 Hearings.

(a) When in the judgment of the Maritime Administrator it appears that the individual nonsubsidized voyages for which approval is requested are forming or tending to form a pattern leading to the establishment of a regular nonsubsidized service, or, if in the case where such a nonsubsidized service has already been established, it appears that the operator proposes to continue such service indefinitely, the Maritime Administrator may call an informal public hearing prior to making a final decision. Such hearing shall consider evidence respecting adequacy or inadequacy of service and such other evidence as

the Maritime Administrator determines is pertinent to the proceedings consistent with his responsibilities under the Merchant Marine Act, 1936, as amended. Such hearing, for advisory purposes only, may be held by the Administrator, or in his discretion, by his designee.

(b) In the event favorable action is taken subsequent to a hearing under § 281.13(a) authorizing a series of voyages, the findings and determinations of the Maritime Administrator shall be subject to annual review, except that upon presentation of new evidence, the Maritime Administrator may at any time reopen for review and after reasonable notice to the operator may cancel or modify any such determination. In the event the operator requests permission to continue its nonsubsidized operations beyond the period authorized by the Maritime Administrator, the Maritime Administrator shall determine whether or not further hearing on said matter is warranted prior to taking final action upon such request.

(c) In the event an operating-differential subsidy application or a request for an adjustment in the number of sailings under an existing contract is or has been filed by a subsidized operator and is under consideration by the Maritime Subsidy Board or scheduled for a section 605(c) hearing, the hearing provisions of these rules and regulations may be waived or suspended by the Maritime Administrator and he may grant such authorizations as he deems appropriate under the circumstances.

[G.O. 80, 22 FR 2911, Apr. 25, 1957, as amended at 33 FR 2944, Feb. 14, 1968]

§ 281.14 Prior authorization.

A series of nonsubsidized voyages previously authorized by the Maritime Administration may continue under the terms of such authorization but may be set for hearing in the discretion of the Maritime Administrator.

§ 281.15 Criteria for approval of nonsubsidized voyages.

(a) *Service.* Each nonsubsidized voyage application must show definite need for the voyage whether or not in addition to the regular sailings maintained by the applicant and that approval of the voyage will not adversely affect applicant's regular sailings.

(b) *Financial results.* Each voyage should show expectation of profit after all proper charges, including overhead, charter hire, depreciation, and interest. However, the Maritime Administrator, in his discretion, may waive or modify this condition.

§ 281.16 Conditions to attach in event of approval of application.

(a) No subsidy shall be payable with respect to said voyage.

(b) The voyage shall not count toward the operator's compliance with the minimum and maximum sailing requirements of its operating-differential subsidy contract.

(c) The financial results (including overhead, depreciation, interest, and all proper charges) of voyages made in other than the operator's subsidized service with subsidized or nonsubsidized ships shall not be included in net earnings from subsidized operations; and the "capital necessarily employed" attributable to the ship(s) performing such operations shall also be excluded from subsidized operations.

(d) The financial results (including overhead, depreciation, interests, and all proper charges) of nonsubsidized voyages made by nonsubsidized ships in the operator's subsidized service shall be included in net earnings from subsidized operations, and the "capital necessarily employed" attributable to the ship(s) performing such operations shall be taken into account as capital necessarily employed in subsidized operations for the period of such voyages; provided, however, the results:

(1) Shall be included in the subsidized operations for recapture and reserve fund purposes if the voyage is partially within the subsidized service and 50 percent or more of the total gross voyage revenue is derived from carrying cargo between ports within the subsidized service, and

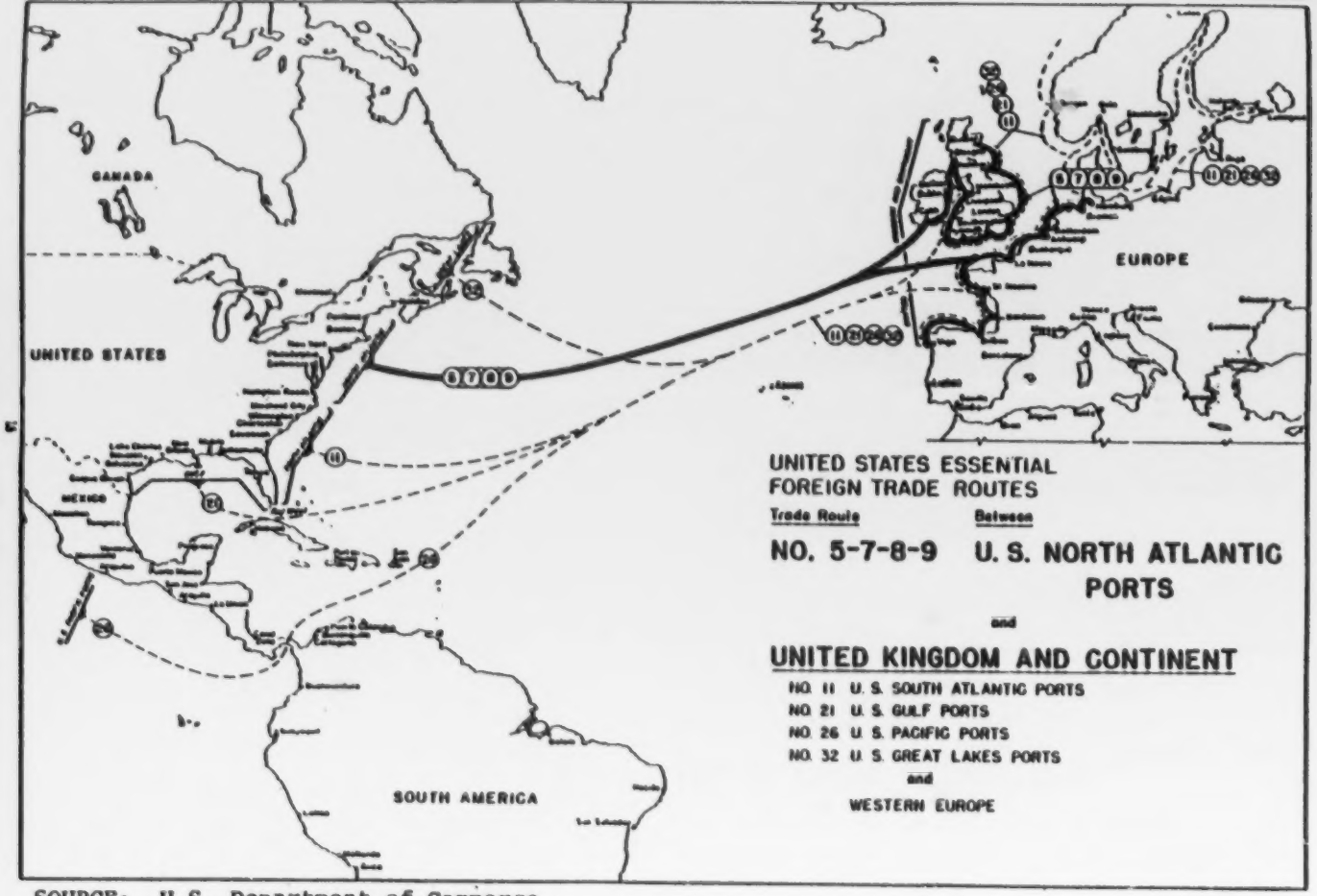
(2) Shall be excluded from the subsidized operations for recapture and reserve fund purposes if the voyage is partially within the subsidized service and less than 50 percent of the total gross revenue is derived from carrying cargo between ports within the subsidized service.

(e) The operator shall not advertise nonsubsidized voyages outside his subsidized service except (1) for passenger ships, (2) where no established U.S.-flag service exists, or (3) where the voyage is part of a nonsubsidized service authorized by the Maritime Administrator. Compliance with the requirements of this section is waived in the event a U.S.-flag berth operator is employing any U.S. Government-owned ship(s) competitively in such route, line, or service under charter pursuant to Public Law 591, 81st Congress.

(f) Without prior written approval of the Maritime Administrator, there shall be no deviation from the terms and conditions of the authorization of the nonsubsidized voyage(s). However, the Maritime Administrator may, in his discretion, where unusual circumstances in any particular case so require or where it may be in the mutual interest of the operator and the Government, authorize a departure from or modification of any of the conditions of paragraphs (b) through (e) of this section.

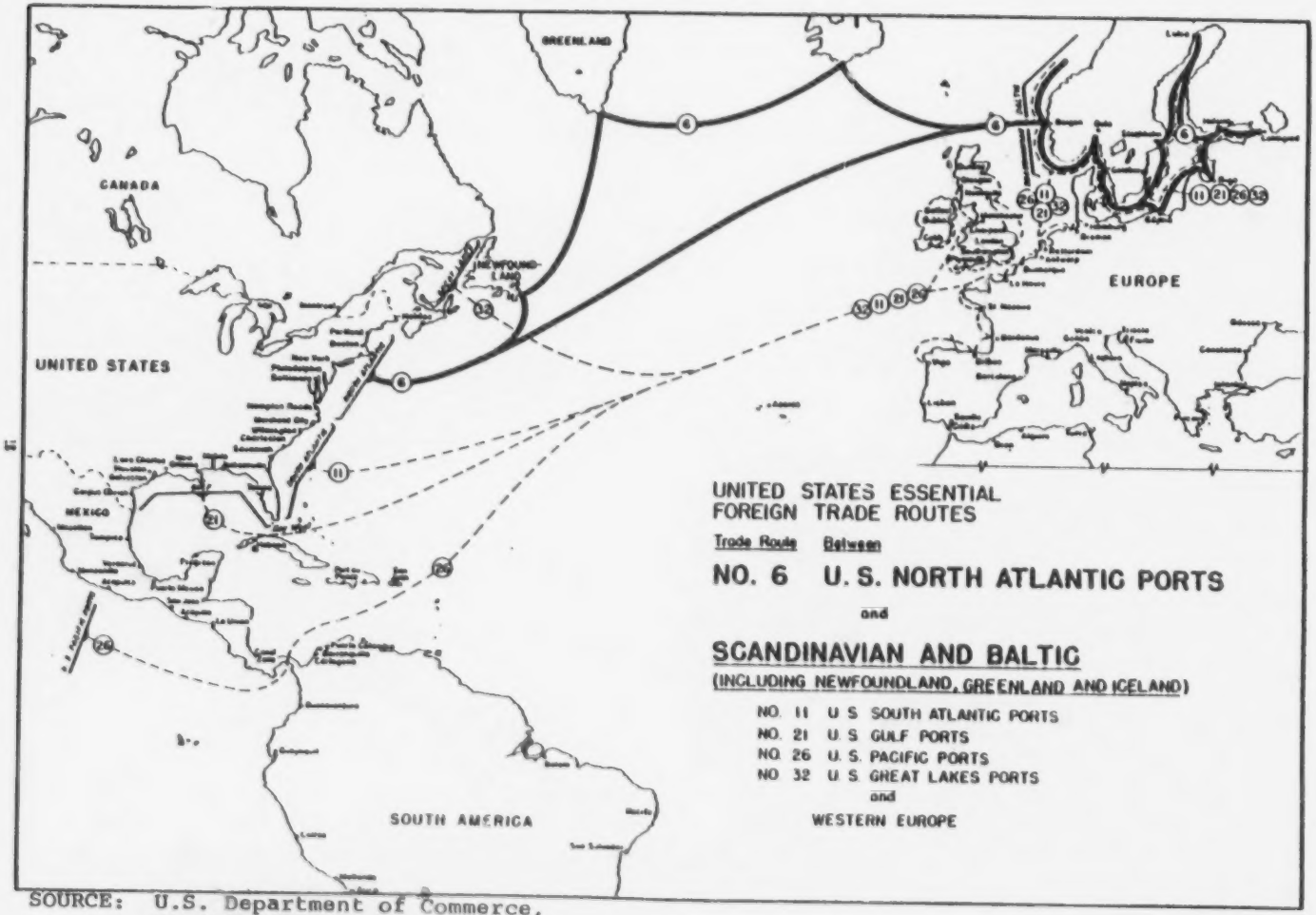
§ 281.17 Determinations and questions of interpretations.

The decision of the Maritime Administrator shall be final with respect to all determinations and questions of interpretation arising under §§ 281.11 to 281.17.

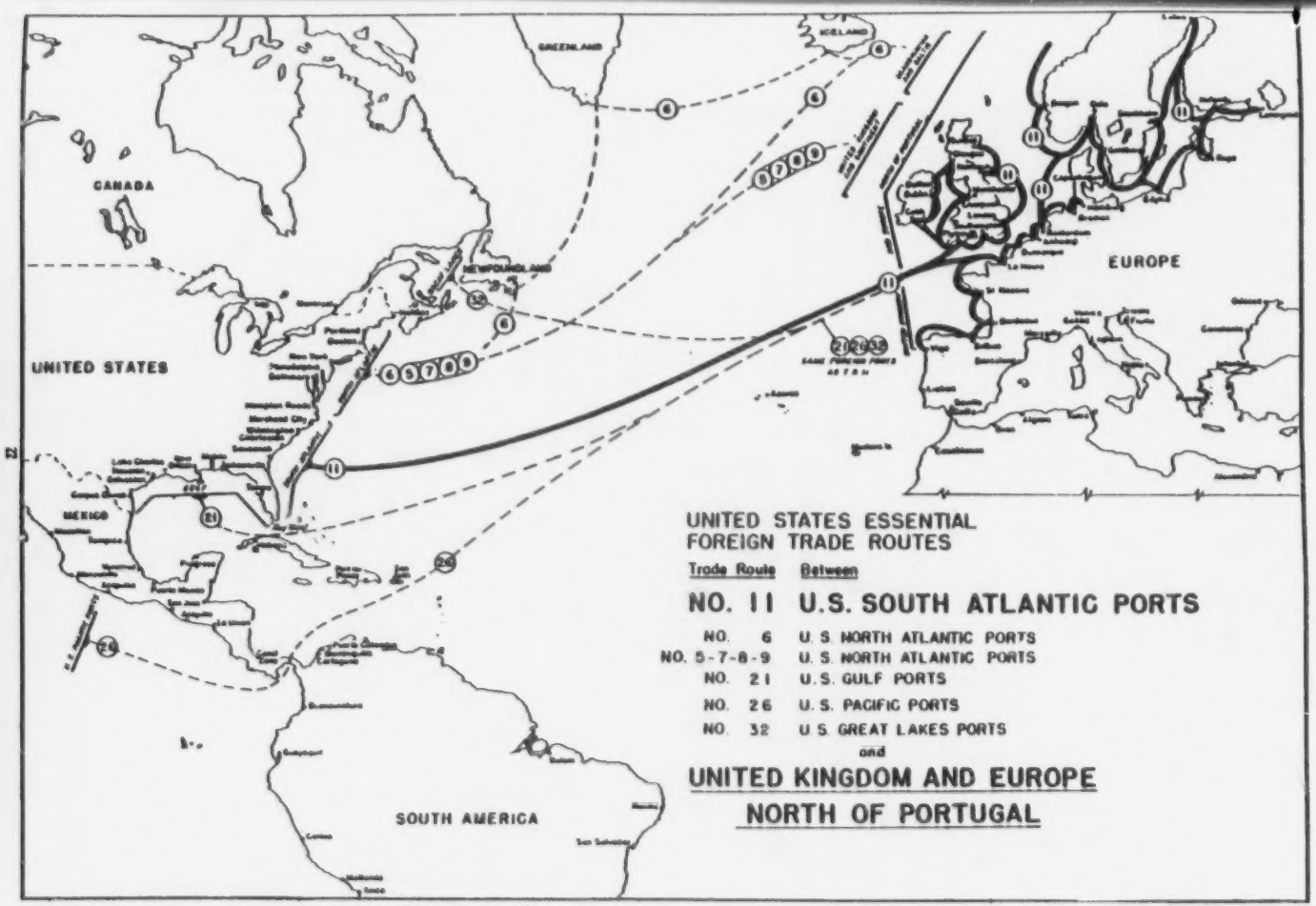


SOURCE: U.S. Department of Commerce, Maritime Administration, Essential United States Foreign Trade Routes (1975).

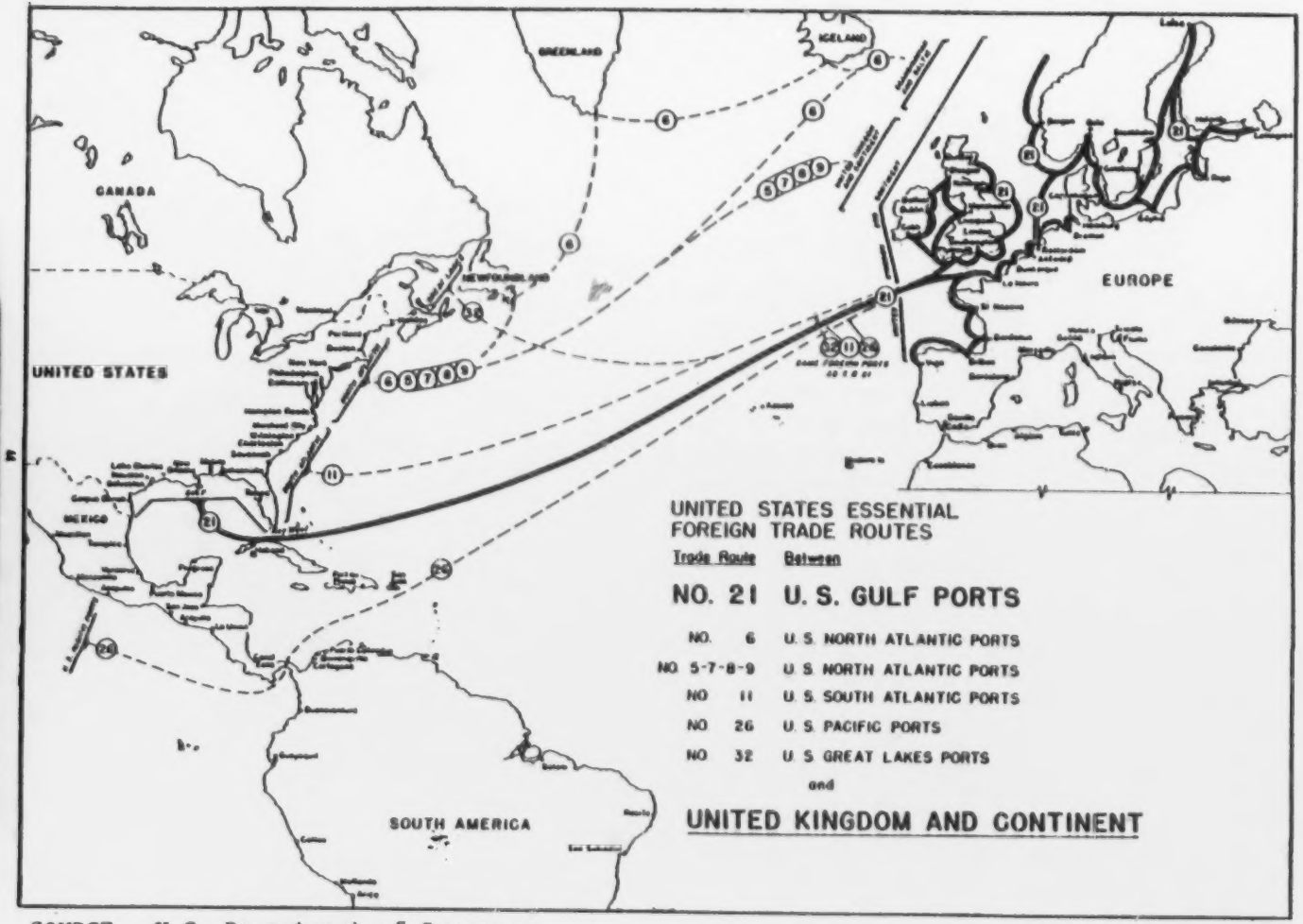
APPENDIX K



SOURCE: U.S. Department of Commerce, Maritime Administration, Essential United States Foreign Trade Routes (1975).



SOURCE: U.S. Department of Commerce,
Maritime Administration,
Essential United States
Foreign Trade Routes
(1975).



SOURCE: U.S. Department of Commerce, Maritime Administration, Essential United States Foreign Trade Routes (1975).

APPENDIX L

WATERMAN STEAMSHIP CORPORATION
120 Wall Street
New York, New York 10005

Gentlemen:

On November 21, 1978, the Maritime Subsidy Board (Board)/Assistant Secretary of Commerce for Maritime Affairs (Assistant Secretary) with respect to (1) the application dated September 18, 1978, as amended, filed by Waterman Steamship Corporation (Waterman) for operating-differential subsidy (ODS) under Title VI of the Merchant Marine Act, 1936, as amended (the Act), for subsidized service on Trade Route (TR) No. 21 with the privilege of providing unsubsidized operations on TRs 5-7-8-9, 6 and 11; (2) the application dated September 18, 1978, as amended, filed by Waterman for construction-differential subsidy (CDS) under Title V of the Act for two MA Design C7-S-133a Roll-on/Roll-off (Ro/Ro) container vessels; and (3) the application dated October 30, 1978, filed by Waterman, for the trade-in of four C4 vessels against the proposed two new Ro/Ro container vessels and operation of four C4 vessels under Use Agreement, took the following actions, subject to the condition that Waterman shall obtain all necessary timely approvals and consents pursuant to Title XI of the Act:

I. By the Assistant Secretary:

A. Pursuant to section 211 of the Act:

(1) Reaffirmed that TR 21 is essential for the promotion, development, expansion, and maintenance of the foreign commerce of the United States and to the national defense and other national requirements.

(2) Determined that C4-S-A4, C4-S-1a, C4-S-1f, C4-S-1h, C4-S-1p and C4-S-1t breakbulk vessels, C9-S-81d and C9-S-81f LASH vessels and C7-S-133a Ro/Ro container vessels are suitable for operation on TRs 21, 18, 12 and 22.

(3) Determined that (a) the U.S.-flag freight service proposed by Waterman on TR 21 is essential for the promotion, development, expansion and maintenance of the foreign commerce of the United States and to the national defense and other national requirements; (b) the vessels proposed to be operated by Waterman on the respective services are suitable for operation thereon; and (c) the frequency of sailings on TR 21 by Waterman as set forth in the attached Appendix A of ODSA, Contract No. MA/MSB-450, is sufficient to furnish adequate, regular, certain and permanent service thereon.

B. Noted that Waterman was previously granted section 804 waivers with respect to the foreign-flag activities of its affiliate, Coordinated Caribbean Transport, Inc.

C. Reaffirmed the approval of Waterman's participation in Pooling Agreement No. 8682, United States Gulf/Japan Cotton Pool, which was previously approved, through Amendment 9, on March 18, 1975, subject to the reaffirmation by the Board of the findings and determinations contained in paragraph II.R. hereof. The reaffirmation of approval of Waterman's participation in Pooling Agreement No. 8682 shall be without prejudice to the right of the Maritime Administration to subsequently review said Agreement, and as a result of such review, to require Waterman to take such lawful action as the Maritime Administration may require to amend, modify, terminate or withdraw from said Agreement, and subject to the further understanding that copies of the final statement for each pool year or part of a year, as the case may be, setting forth the final statement of pool revenue, as well as copies of such other reports, if any, as the Federal Maritime Commission may require under section 15 of the Shipping Act, 1916, as amended, shall be forwarded to the Maritime Administration.

D. Found, pursuant to section 510 of the Act, that the THOMAS JEFFERSON, ARTHUR MIDDLETON, ROBERT

TOOMBS and ALEX STEPHENS are obsolete vessels within the meaning of section 510 and that said vessels may be traded in at the time Waterman contracts for the construction of two Ro/Ro container replacement vessels.

E. Found, pursuant to section 510(a)(1) of the Act, that the vessels offered for trade-in (a) are of not less than 1,350 gross tons, (b) should be reason of age, obsolescence, or otherwise, be replaced in the public interest, and (c) have been owned by a citizen or citizens of the United States for at least three years prior to the date of acquisition by the Government.

F. Found that the two proposed new MA Design C7-S-133a Ro/Ro container vessels meet the gross tonnage and utility value requirements of section 510(c) of the Act.

G. Determined that the fair and reasonable trade-in value to be allowed for the THOMAS JEFFERSON and ARTHUR MIDDLETON is $1,200,000 for each vessel, and the fair and reasonable trade-in value to be allowed for the ROBERT TOOMBS and ALEX STEPHENS is $1,350,000 for each vessel.

H. Authorized the acquisition of the THOMAS JEFFERSON, ARTHUR MIDDLETON, ROBERT TOOMBS and ALEX STEPHENS by the Maritime Administration, on behalf of the United States, in exchange for an allowance of credit herein determined to be proper, provided: (a) the obsolete vessels are in good operating condition, in class and with required certificates, (b) a Trade-In Contract covering the obsolete vessels is executed, and (c) the Trade-In Contract includes, among other things, terms and conditions as follows:

(1) The gross trade-in allowance shall be shown in Article 3:

Vessel	Gross Trade-In Allowance
Thomas Jefferson	$1,200,000
Arthur Middleton	1,200,000
Alex Stephens	1,350,000
Robert Toombs	1,350,000
TOTAL	$5,100,000

(2) The estimated net trade-in allowance shall be shown in Article 4:

Vessel	Trade-In Allowance	Estimated Charter Hire During Use Period	Estimated Net Trade-In Allowance
Thomas Jefferson	$1,200,000	$ 597,794.11	$ 602,205.89
Arthur Middleton	1,200,000	542,095.74	657,904.26
Alex Stephens	1,350,000	597,794.11	752,205.89
Robert Toombs	1,350,000	597,794.11	752,205.89
TOTAL	$5,100,000	$2,335,478.07	$2,764,521.93

(3) A provision that Waterman (1) will assign an option to the Maritime Administration to purchase any shorebased replacement parts owned by Waterman, when needed, at a reasonable market value and (2) will assign to the Maritime Administration a 30-day option to buy such parts before sale to any other party.

(4) A provision that if, pursuant to the provisions of Article XXXVIII of Construction Contract No. MA/MSB-446 between Waterman and Sun Shipbuilding and Dry Dock Company, the Construction Contract is terminated, the Trade-In Contract and Use Agreement shall be deemed immediately rescinded and Waterman agrees to pay all recording costs and other expenses necessary to promptly retransfer title to each obsolete vessel to Waterman; provided, however, that Waterman's obligations with respect to insurance coverage and indemnification of the Government under the Use Agreement shall remain in effect until the bill of sale retransferring title to each obsolete vessel to Waterman has been recorded.

I. Subject to execution of the Trade-In Contract by Waterman covering the obsolete vessels, approved the charter of the vessels to Waterman under Use Agreement, which shall include, among other things, the following provisions:

(1) The on-voyage charter hire for each C4 vessel shall be $612.07 per diem, commencing from 1201 hours on the date of execution of the Trade-In Contract until 1200 hours on the day the Contracting Officer is notified in

writing that such vessel has arrived free of cargo, at the port or place where survey and redelivery obligations will be accomplished, and off-voyage charter hire per diem for each vessel shall be $75.00 from 1201 hours on such date of notification of arrival and will continue until the day and hour of redelivery at the Reserve Fleet Site.

(2) Insurance requirements for each vessel shall be not less than:

	Thomas Jefferson	Arthur Middleton	Alex Stephens	Robert Toombs
Marine Hull & Machinery	$1,200,000	$1,200,000	$1,350,000	$1,350,000
War Risk Hull & Machinery	1,200,000	1,200,000	1,350,000	1,350,000
Marine Protection & Indemnity	2,500,000	2,499,000	2,112,400	2,112,400
War Risk Protection & Indemnity	2,500,000	2,499,000	2,112,400	2,112,400
Marine General Average, Salvage, and Collision Liabilities	1,200,000	1,200,000	1,350,000	1,350,000
War Risk General Average, Salvage, and Collision Liabilities	1,200,000	1,200,000	1,350,000	1,350,000

(3) There shall be no deduction for excluded items.

(4) Based on Waterman using the obsolete vessels for maintenance of its subsidized operations until completion of voyages current at the time of delivery of the proposed replacement vessels, determined that charter hire will be as follows with the trade-in allowance on each of the C4 vessels to be subject to adjustment upon determination of the actual charter hire after redelivery of the vessels:

Vessel	Estimated On-Voyage Per Diem Days	Estimated Off-Voyage Per Diem Days	Estimated Charter Hire for Period
Thomas Jefferson	973	30	$597,794.11
Arthur Middleton	882	30	542,095.74
Alex Stephens	973	30	597,794.11
Robert Toombs	973	30	597,794.11

(5) Waterman shall furnish security in the amount of $50,000 per vessel at the time said Use Agreement is executed and shall furnish additional security in the amount of $200,000 for each vessel upon the arrival of each vessel at the shipyard which will perform the survey, repair and redelivery work.

(6) The redelivery of vessels as set forth in Clause 13 of the Use Agreement.

J. Authorized the execution with Waterman of Trade-In Contract No. MA-9147, Use Agreement, Contract No. MA-9148, containing the provisions discussed in H. and I. above, and related documents.

K. Authorized the General Counsel or Assistant General Counsel or other attorney or person designated by the General Counsel or Assistant General Counsel to act in respect to all matters which may be necessary to effectuate the foregoing recommendations on the Trade-In Contract and Use Agreement.

II. By the Board with respect to the grant of ODS and Contract Nos. MA/MSB-115 and MA/MSB-378, as applicable:

A. Noted the section 605(c) determinations made in the Final Opinion and Order of the Board in Docket Nos. S-421 and S-455, dated September 1, 1978 and served on September 5, 1978, and noted that the Board by Order dated November 15, 1978, served on November 16, 1978, denied Waterman's request for reconsideration with respect to the grant of ODS for (1) TRs 5-7-8-9 and (2) 6 and 11.

B. Found and determined pursuant to section 601(a) of the Act, with respect to the vessels to be operated on TR 21 under Contract No. MA/MSB-450 and with respect to the operation of the GEORGE WALTON and JOHN PENN on TR 18 under Contract No. MA/MSB-115, that:

1. The operation in an essential service by Waterman of the GEORGE WALTON and JOHN PENN and the four vessels named in the attached Appendix B of the new

ODSA, which are vessels built in the United States and documented under the laws of the United States, is required to meet foreign-flag competition and to promote the foreign commerce of the United States;

2. Waterman owns or leases, or can and will build, purchase or lease, vessels of the size, type, speed and number, and with the proper equipment required to enable it to operate in and maintain such essential service, route, or line, in such manner as may be necessary to meet competitive conditions and to promote foreign commerce;

3. Waterman possesses the ability, experience, financial resources and other qualifications necessary to enable it to conduct the proposed operations of the vessels so as to meet competitive conditions and promote foreign commerce; and

4. The granting of the aid applied for is necessary to place the proposed operations of the vessels on a parity with those of foreign competitors and is reasonably calculated to carry out effectively the purposes and policy of the Act.

C. Found and determined pursuant to section 610 of the Act that the GEORGE WALTON and JOHN PENN and the vessels named in the attached Appendix B of the new twenty year ODSA are: (1) constructed of steel, (2) propelled by steam, (3) as nearly fireproof as practicable, and (4) constructed according to plans and specifications approved by the Secretary of Commerce and the Secretary of the Navy.

D. Found, pursuant to section 605(b) of the Act, that it is in the public interest to grant financial aid for the operation of the vessels named in Appendix B of the new twenty-year ODSA while more than 25 years of age, until such vessels are replaced by the proposed new construction, or until otherwise withdrawn from said contract, and authorized the attached section 605(b) Resolution and Order with respect to those vessels.

E. Found, pursuant to section 605(b) of the Act, that it is in the public interest to grant financial aid for the operation of the GEORGE WALTON and JOHN PENN under Contract

No. MA/MSB-115 while more than 25 years of age, until such vessels are replaced by new construction, or until otherwise withdrawn from said contract, and authorized the attached section 605(b) Resolution and Order with respect to those vessels.

F. Determined that Waterman meets the citizenship requirements of section 905(c) of the Act.

G. Found that Waterman has established that the vessel operations to be subsidized will be conducted in a manner which will not preclude Waterman from earning at least 50 percent of its inbound gross freight revenues and at least 50 percent of its outbound gross freight revenues for the service covered by the application from the carriage of commercial cargoes, conference-rated civilian preference cargoes, or open-rated civilian preference cargoes carried at "world" rates.

H. Found and determined, pursuant to Title VI of the Act and the appropriate implementing provisions of the ODS contract and the Manual of General Procedures for Determining Operating-Differential Subsidy, effective with the entry of each vessel into the subsidized service, that the detailed crew complements set forth in the attached Appendix E to Contract No. MA/MSB-450 and the attached Schedule A to Contract No. MA/MSB-115 with respect to the GEORGE WALTON and JOHN PENN, plus two U.S. Merchant Marine Academy cadets, on an if and when carried basis, are necessary for the efficient and economical operation of the vessels, and if otherwise eligible under the Manual of General Procedures for Determining Operating-Differential Subsidy, the wage costs of said crew complements shall be allowed for subsidy purposes; provided that should the crew complement actually employed on each of the vessels differ from or exceed the detailed crew complement stipulated in Appendix E to Contract No. MA/MSB-450, or the attached Schedule A to Contract No. MA/MSB-115, as applicable, or if the Operator agrees with one or more authorized collective bargaining units upon a crew complement for any vessel which is included in this Agreement, or for the GEORGE WALTON and JOHN PENN, which is lower than the crew complement approved by the Board, then

for subsidy rate-making and subsidy payment purposes the collective bargaining costs shall not exceed the costs of the crew complement approved by the Board or the crew complement negotiated by the Operator, whichever is less.

I. Authorized the amendment of Article I-3, effective with the effective date of Contract No. MA/MSB-450, of Contract No. MA/MSB-115 and of Contract No. MA/MSB-378 to provide that Waterman may transfer or interchange (substitute) those C4 and LASH type vessels as named in Contract No. MA/MSB-115 and those C4 and LASH type vessels as named or described as replacement vessels in Contract No. MA/MSB-378 with those C4 and Ro/Ro container type vessels as named or described as replacement vessels in Contract No. MA/MSB-450 at a common U.S. port upon completion of any round voyage without the prior approval of the United States, and authorized the substitution in Contract No. MA/MSB-378 of the attached Appendix B for the Appendix B currently in the contract.

J. Authorized the amendment of Article I-3 of Contract No. MA/MSB-115 to provide that (1) the C4-S-A4 vessels ALEX STEPHENS and ROBERT TOOMBS shall be withdrawn from the contract on the effective date of Contract No. MA/MSB-450 or upon completion of the last subsidized voyage of each vessel, which shall be that voyage in progress on the effective date of Contract No. MA/MSB-450; and (2) with respect to the vessels GEORGE WALTON and JOHN PENN, said vessels shall be included in Contract No. MA/MSB-115 on the effective date of Contract No. MA/MSB-450, provided that said vessels shall not commence subsidized service under Contract No. MA/MSB-115 until termination of subsidized service of the ALEX STEPHENS and/or ROBERT TOOMBS, on a one-for-one basis; however, the GEORGE WALTON and/or JOHN PENN may commence voyages, under transfer privileges, on the subsidized service under either Contract No. MA/MSB-378 or Contract No. MA/MSB-450 on or after the effective date of Contract No. MA/MSB-450.

K. Determined that the ALEX STEPHENS and ROBERT TOOMBS shall each be included in Contract No. MA/MSB-

450 as of 0001 hour on the day subsequent to the day of completion of its last subsidized voyage under Contract No. MA/MSB-115, on or after the effective date of Contract No. MA/MSB-450.

L. Authorized the amendment of Article I-4 of Contract No. MA/MSB-115, as permitted by section 603(b) of the Act, to provide that with respect to the ROBERT TOOMBS and ALEX STEPHENS, subsidy shall be payable for hull and machinery insurance and maintenance and repairs not compensated by insurance only for voyages terminated while the vessels are assigned to Contract No. MA/MSB-115, and with respect to repairs, only if the repair items have been accomplished prior to termination of the last voyage of the vessels when assigned to Contract No. MA/MSB-115.

M. Authorized the amendment of Article I-4 of Contract No. MA/MSB-115, as permitted by section 603(b) of the Act, to provide that with respect to the operation of the vessels assigned to Contract No. MA/MSB-450 or Contract No. MA/MSB-378 and operated on TR 18 under transfer and interchange provisions, unless a lesser amount of subsidy is payable under Contract No. MA/MSB-115, subsidy shall be payable with respect to those items of expense eligible for subsidy under Contract No. MA/MSB-450 or Contract No. MA/MSB-378, as applicable.

N. Authorized the waiver of survey and inventory requirements under Contract No. MA/MSB-115 with respect to the ALEX STEPHENS and ROBERT TOOMBS and any requirement under General Order No. 20, 3rd Rev., or otherwise, for the payback of ODS for unused spare parts, effective upon termination of the last voyage of each of the vessels eligible for maintenance and repair subsidy.

O. Authorized Waterman to provide the following nonsubsidized operations, as set forth separately in the attached Appendix A of Contract No. MA/MSB-450, without the prior approval of the United States:

Between U.S. Atlantic ports (Portland, Maine, to Key West inclusive) and ports in the United Kingdom, Repub-

lic of Ireland, Continental Europe north of Portugal, Baltic (Poland and U.S.S.R. in the Baltic Sea), Scandinavia (Norway, Sweden, Denmark and Finland) and U.S.S.R. east of Finland in the Barents Sea.

Waterman may conduct such nonsubsidized operations, subject to the provisions of P. below, as part of, and in conjunction with, the required subsidized service described in Appendix A and as separate round voyages independent of the required subsidized service described in Appendix A.

P. Determined that pursuant to the authorization for nonsubsidized operations authorized in O. above (1) subsidy shall not be paid on separate round voyages independent of the subsidized service described in Appendix A, and (2) subsidy payable for subsidized service described in Appendix A shall be subject to a reduction of subsidy for nonsubsidized operations as part of, and in conjunction with the subsidized service, which reduction shall be calculated and determined as follows, as set forth in the attached Appendix A:

On subsidized voyages commencing and terminating in the U.S. Gulf and calling at the Atlantic Coast, the total time of such calls including port and sea time shall not be included in the calculation of subsidy, except for that time lost or consumed by the ship that is determined to be time that would have been lost or consumed even had there been no Atlantic Coast calls. In addition, steaming and port time required for calls at a foreign port for which there is no Trade Route No. 21 cargo activity shall not be included in the calculation of subsidy.

Q. Authorized the amendment of Article I-9 of Contract No. MA/MSB-115, as appropriate, to include the following provisions:

(1) The Operator shall contract for one (1) or two (2) modern replacement vessels, of a size and type suitable for operation on Trade Route No. 13, by December 31, 1980;

(2) The Operator shall also contract for one (1) or two (2) modern replacement vessels, except as provided in

subparagraphs (6) and (7), of a size and type suitable for operation on Trade Route No. 18, by July 31, 1984;

(3) In the event that the Operator opts not to build replacement vessels in 1980, it shall fulfill its entire replacement obligation by entering into a contract or contracts for two (2) modern replacement vessels by December 31, 1982, and, at the Operator's option, a third and/or fourth modern replacement vessel(s) by July 31, 1984, such option to be exercised by that date except as provided in subparagraph (6);

(4) In the event that the Operator requests relief from the Board in respect to the operation of its vessels on Trade Route Nos. 12 and 22 and/or on Trade Route No. 21 as specified in Appendix F(1)(b) of Contract No. MA/MSB-378 and Appendix F(c) of Contract No. MA/MSB-450 and such relief is granted, the Operator may introduce its two (2) new Trade Route Nos. 12 and 22 LASH vessels and/or its two (2) new Trade Route No. 21 Ro-Ro container vessels into subsidized service on Trade Route No. 18 in satisfaction of all or part of its replacement obligations still outstanding;

(5) In the event that (a) Civil Action No. 77-0386, *Sea-Land Service Inc.* v. *Richardson, et al.*, in the U.S. District Court for the District of Columbia, or any similar action, as finally concluded, results in the termination of Contract No. MA/MSB-378, or (b) any civil action, as finally concluded, results in the termination of Contract No. MA/MSB-450, or the termination of the payment of subsidy under either or both of said Contracts, prior to the date by which the Operator must contract for the first replacement vessel on Trade Route No. 18, the two (2) Trade Route Nos. 12 and 22 LASH vessels and/or the two (2) Trade Route No. 21 Ro-Ro container vessels shall be introduced into service on Trade Route No. 18 and shall be considered as meeting all or part of the replacement obligation on Trade Route No. 18;

(6) In the event that Civil Action No. 77-0386, or any similar civil action with respect to Contract Nos. MA/MSB-378 and/or MA/MSB-450, has not finally concluded by July 31, 1984, and the Operator has introduced or contracted for only two (2) or three (3) replacement vessels by that date, the exercise of the Operator's option to contract for the one (1) or two (2) remaining replacement obligation vessels on Trade Route No. 18 will be deferred until not in excess of six (6) months subsequent to such final conclusion, and if such conclusion results in the termination of Contract Nos. MA/MSB-378, and/or MA/MSB-450, or the termination of the payment of subsidy thereunder, such obligation may be satisfied by the transfer of one (1) or two (2) Trade Route Nos. 12 and 22 LASH vessels or one (1) or two (2) Trade Route No. 21 Ro-Ro container vessels or, if applicable, a combination of both, to Trade Route No. 18;

(7) Nothwithstanding subparagraphs (1) or (2), if at any time Civil Action No. 77-0386, or any similar civil action with respect to Contract Nos. MA/MSB-378 and/or MA/MSB-450 finally results in both of said contracts being upheld, or if at any time it is established to the satisfaction of the parties or by action of a court of competent jurisdiction that no such civil action(s) will be instituted, the Operator shall within six (6) months of such event contract unconditionally for at least one (1) new vessel for Trade Route No. 18 but may at its option meet its total obligation for Trade Route No. 18 at that time, and in any event, if it does not meet its total obligation at that time, must contract unconditionally for at least one (1) additional vessel not later than July 31, 1984, thus meeting its minimum total replacement obligation of two (2) vessels for Trade Route No. 18 by July 31, 1984;

(8) If two (2) modern replacement vessels enter service under this Agreement, the first modern replacement vessel to enter service under this Agreement shall replace the one (1) C4-S-1f and one (1) C4-S-1a type vessels listed in Article I-3(a) and the second such vessel shall replace the two (2) C4-S-1t type vessels listed in Article I-

3(a) or, if four (4) modern replacement vessels enter service under this Agreement, each vessel shall replace one (1) C4 type vessel, with the two (2) C4-S-1t vessels to be the last vessels replaced; and

(9) If the event described in clause (4) above occurs after the date by which the Operator must complete the contracting requirements for modern replacement vessels on Trade Route 18, the Operator may, at its option, exercised within one year after the occurrence of such event, redesignate the modern vessels named in this Agreement from among any modern vessels in the Operator's fleet not then covered by another ODSA.

R. Noted that in paragraph I.C. hereof the Assistant Secretary is reaffirming the approval previously granted of Waterman's participation in Pooling Agreement No. 8682, United States Gulf/Japan Cotton Pool, through Amendment 9, and reaffirmed the findings and determinations previously made with respect to Pooling Agreement No. 8682.

S. Authorized the inclusion in Contract No. MA/MSB-378 of the attached Appendix I with respect to Pooling Agreement No. 8682.

T. Determined that, with respect to the payment by Waterman of dividends to Waterman Marine Corporation, Waterman shall not be bound by the requirements of the Conservative Dividend Policy during the period of construction of the two proposed Ro/Ro container vessels and during the period of repayment by Waterman of the equity loan from Manufacturers Hanover Trust Company in connection with such construction but shall be subject to such dividend restrictions as contained in the concurrent action of the Assistant Secretary with respect to Title XI commitments for the construction project.

U. Approved Waterman's application of September 18, 1978, as amended, and authorized the execution of ODSA, Contract No. MA/MSB-450, between Waterman and the Board, such contract to be binding upon execution and effective for the payment of subsidy for a period of 20 years from the

effective date of Contract No. MA/MSB-450, such contract to include provisions for the following:

1. the sailing requirements and service descriptions as contained in Appendix A;

2. the vessels eligible for subsidy and transfer and interchange privileges as contained in Appendix B;

3. the tentative subsidy rates as set forth in Appendix C until superseded by final subsidy rates, which will be set forth in Appendix D when authorized;

4. the manning scales as set forth in Appendix E;

5. the replacement program as set forth in Appendix F;

6. the section 804 waivers as set forth in Appendix G;

7. the Pooling Agreement as set forth in Appendix I;

8. Article I-4 shall provide, as permitted by section 603(b) of the Act, that with respect to vessels assigned to the contract and operated on TR 21, and with respect to vessels operated on TR 21 under transfer or interchange privileges, unless a lesser amount of subsidy is payable on such vessels under Contract No. MA/MSB-115 or Contract No. MA/MSB-378, which subsidy shall be applicable to those vessels operating under Contract No. MA/MSB-450, subsidy shall be payable with respect to expenses incurred for wages and protection and indemnity insurance but that expenses incurred for hull and machinery insurance, maintenance and repairs not compensated by insurance, and protection and indemnity insurance deductible absorptions not attributable to TR 21 subsidized service, shall not be eligible for subsidy;

9. the commencement of the first voyage of each vessel in accordance with Article II-28(c) except as provided in K. above;

10. with respect to vessels assigned to the contract, the waiver of survey and inventory requirements and any requirements under General Order No. 20, 3rd Rev., or otherwise, for the payback of ODS for unused spare parts;

11. the payment of dividends as set forth in T. above; and

12. the standard part II-A(1) of the contract.

III. By the Board with respect to the grant of CDS and related matters:

A. Determined under section 501(a) of the Act that (1) the plans and specifications call for new vessels which will meet the requirements of the foreign commerce of the United States, will aid in the promotion and development of such commerce, and will be suitable for use by the United States for national defense or military purposes in time of war or national emergency; (2) Waterman possesses the ability, experience, financial resources and other qualifications necessary for the operation and maintenance of the proposed new vessels; and (3) the granting of the aid applied for to the extent contemplated herein is reasonably calculated to carry out effectively the purposes and policy of the Act.

B. Approved the plans and specifications as satisfying the commercial requirements of Waterman's service and approved the following basic commercial characteristics:

	English	Metric
Length overall	692′-0″	210.92m
Length between perpendiculars	640′-0″	195.07m
Beam, molded	105′-6″	32.16m
Depth, molded	68′-0″	20.73m
Draft, full load, molded	33′-0″	10.06m
Deadweight	23,500 L.T.	23,877 t
Service speed (est.)	20.9 knots	38.7 km/h
Rated horsepower	32,000 SHP	23,862 kw
Container capacity	1,524 TEU	
Dry cargo bale cubic	2,156,000 cu. ft.	61,051 m^3
Special features:	30 L.T. container crane, slewing stern ramp, cargo elevator	

Provided that any changes to the plans and specifications indicated above shall be subject to the review and approval of the Office of Ship Construction.

C. Noted that the plans and specifications for the construction of the proposed vessels were submitted to the Department of the Navy for examination and suggestions in accordance with section 501(b) of the Act, and determined pursuant to section 501(a) of the Act and in accordance with the certification under section 501(b) of the Act in the letter dated October 18, 1978, from the Department of the Navy, that the proposed MA Design C7-S-133a Ro/Ro container vessels will be suitable for use by the United States in time of war or national emergency, and that the following items suggested by the Department of the Navy to enhance the suitability of the vessels for wartime use are in excess of commercial requirements, with the exception of items b. and i., and that the cost thereof, with the exception of items b. and i., shall be for the sole account of the United States:

a. Nuclear, Biological and Chemical (NBC) Washdown

b. Communications Equipment

c. Prohibition of Grey Cast Iron

d. Container Handling Crane

e. Sideports

f. Carriage of Military Vehicles

g. Helicopter Landing Requirements

h. Transient Personnel Provisions

i. Carriage of 20′ Containers

j. Emergency Hatches

k. Recessed Mooring Bitts

D. Directed that any contracts executed by the Board with Waterman regarding the grant of CDS on the proposed vessels

include appropriate recapture provisions with respect to the National Defense Features set forth above, with the exception of items b. and i. above, which are not subject to recapture.

E. Noted that (1) the Board will determine what it would cost for the construction of the two Ro/Ro container vessels under similar plans and specifications in a foreign shipbuilding center deemed by the Board to furnish a fair and representative example for the determination of the estimated foreign cost of the proposed construction; and (2) subject to a determination by the Board that the negotiated domestic price is fair and reasonable and will result in a CDS that is equal to or less than the statutory limitation, and subject to the availability of appropriated funds, the Board will pay to the shipbuilder within the statutory limit the difference between the domestic cost and the estimated foreign cost as determined by the Board.

F. Found that a crew complement of 33 men, plus two USMMA cadets on an if and when carried basis, is necessary for the efficient and economical operation of the MA Design C7-S-133a Ro/Ro container vessels, that such crew complement, for both CDS and ODS purposes, shall be as set forth in the attached Schedule A, and approve a total of 41 berths and 40 rooms for CDS purposes.

G. Found and determined under section 601(a) of the Act that (1) the operation of the proposed Ro/Ro container vessels on Waterman's TR 21 service is required to meet foreign-flag competition and promote the foreign commerce of the United States; (2) Waterman owns or leases, or can and will build or purchase or lease, vessels of the size, type, speed, and number, and with the proper equipment required to enable it to operate on an essential service in such manner as may be necessary to meet competitive conditions and promote foreign commerce; (3) Waterman possesses the ability, experience, financial resources and other qualifications necessary to enable it to conduct the proposed operation of the vessels so as to meet competitive conditions and promote foreign commerce; and (4) the granting of the aid applied for is necessary to place the proposed operations of the vessels on a parity with those of foreign competitors and is reasonably calculated to carry out effectively the purposes and policy of the Act.

H. Determined that Waterman meets the citizenship requirements of section 2(a) and (c) of the Shipping Act, 1916, as amended.

I. Authorized the grant and payment of CDS to aid in the construction of the proposed vessels and approved and authorized the execution of CDS Contract No. MA/MSB-447, between the Board and Sun Shipbuilding and Dry Dock Company and Board Contract No. MA/MSB-448, between the Board and Waterman.

J. Determined that the construction of two Ro/Ro container vessels by Waterman fulfills the replacement obligation as set forth in the attached Appendix F of ODSA, Contract No. MA/MSB-450.

K. Terminated all obligations of Waterman under Sales Contract No. MA-1136 with respect to the THOMAS JEFFERSON, effective as of the date title to the vessel passes to the Government, provided that such obligations as are necessary to be carried forward shall be as set forth in Use Agreement, Contract No. MA-9148.

Your attention is invited to the provisions of Section 7 of the Department of Commerce Organization Order 10-8 with the request that you indicate your acceptance of the above actions by signing and returning the enclosed copy of this letter, noting the date of signing thereon.

Sincerely,

JAMES S. DAWSON, JR.
Secretary

Enclosures

cc: Robert A. Peavy, Esq.

RESOLUTION

WHEREAS in consideration of the application dated September 18, 1978, as amended by letter dated October 30, 1978, filed by Waterman Steamship Corporation, for operating-differential subsidy under Title VI of the Merchant Marine Act, 1936, as amended (the Act), to aid in the operation of vessels on essential Trade Route No. 21, the Maritime Subsidy Board on November 21, 1978, made the requisite findings under section 605(b) of the Act, subject to the issuance of a formal order thereon, and subject to the conditions set forth in the action and in Operating-Differential Subsidy Agreement, Contract No. MA/MSB-450, with Waterman Steamship Corporation, that it is in the public interest to grant financial aid, during the period and under the terms stipulated in the said Subsidy Agreement, for the operation of the vessels listed hereunder, and

WHEREAS, the four vessels listed hereunder will be over 25 years of age during the term of Operating-Differential Subsidy Agreement, Contract No. MA/MSB-450, and

WHEREAS, the four vessels listed hereunder will operate on an essential Trade Route in the U.S. foreign commerce and are suitable and competitive vessels for that trade, and

WHEREAS, Waterman Steamship Corporation has agreed to replace the four vessels listed hereunder with new Ro/Ro Container vessels.

NOW THEREFORE, THE MARITIME SUBSIDY BOARD hereby finds that, on the basis of the facts herein set forth, it is in the public interest to grant financial aid for the operation of the vessels named hereunder, while more than 25 years of age, under Operating-Differential Subsidy Agreement, Contract No. MA/MSB-450, terminating on the date and under the terms and conditions set forth therein; and

ORDERS that financial aid for the operation of the ships listed hereunder, while more than 25 years of age, shall be granted under the aforesaid Subsidy Agreement, subject to all terms and conditions set forth therein; provided that, should any of the old ships named hereunder fail to qualify for operation under any of the United States regulatory agencies having jurisdiction thereof, this authorization shall thereupon terminate as to any such ship, except that where due to collision or other similar accidental circumstances, the ship may temporarily lose its qualified status, and the United States determines that the operator is diligently pursuing all means to qualify such ship, the Maritime Subsidy Board shall defer termination to this authorization as to such ships; and provided further that, in the event that the operator fails to contract for Ro/Ro container vessels, as specified in Appendix F to Contract No. MA/MSB-450, to replace the vessels listed below, this authorization shall thereupon terminate.

Name of Vessel	Official Number	Date Built	Period during which subsidy must be paid
Thomas Jefferson	266977	1954	Until subsidy no longer accrues under the provisions of Operating-Differential Subsidy Agreement, Contract No. MA/MSB-450, or is otherwise prohibited by this resolution.
Authur Middleton	264597	1953	
Alex Stephens	524489	1945	
Robert Toombs	523346	1945	

Date: November 21, 1978

SO ORDERED BY THE
MARITIME SUBSIDY BOARD/
MARITIME ADMINISTRATION

.....

JAMES S. DAWSON, JR.
Secretary

RESOLUTION

WHEREAS in consideration of the application dated September 18, 1978, as amended by letter dated October 30, 1978, filed by Waterman Steamship Corporation, for operating-differential subsidy under Title VI of the Merchant Marine Act, 1936, as amended (the Act), to aid in the operation of vessels on essential Trade Route No. 18, the Maritime Subsidy Board on November 21, 1978, made the requisite findings under section 605(b) of the Act, subject to the issuance of a formal order thereon, and subject to the conditions set forth in the action and in Operating-Differential Subsidy Agreement, Contract No. MA/MSB-115, as amended, with Waterman Steamship Corporation, that it is in the public interest to grant financial aid, during the period and under the terms stipulated in the said Subsidy Agreement, for the operation of the vessels listed hereunder, and

WHEREAS, the two vessels listed hereunder will be over 25 years of age during the term of Operating-Differential Subsidy Agreement, Contract No. MA/MSB-115, and

WHEREAS, the two vessels listed hereunder will operate on an essential Trade Route in the U.S. foreign commerce and are suitable and competitive vessels for that trade, and

WHEREAS, Waterman Steamship Corporation has agreed to replace the two vessels listed hereunder with new vessels.

NOW THEREFORE, THE MARITIME SUBSIDY BOARD hereby finds that, on the basis of the facts herein set forth, it is in the public interest to grant financial aid for the operation of the vessels named hereunder, while more than 25 years of age, under Operating-Differential Subsidy Agreement, Contract No. MA/MSB-115, terminating on the date and under the terms and conditions set forth therein; and

ORDERS that financial aid for the operation of the ships listed hereunder, while more than 25 years of age, shall be granted under the aforesaid Subsidy Agreement, subject to all terms and conditions set forth therein; provided that, should any of the old ships named hereunder fail to qualify for operation under any of the United States regulatory agencies having jurisdiction thereof, this authorization shall thereupon terminate as to any such ship, except that where due to collision or other similar accidental circumstances, the ship may temporarily lose its qualified status, and the United States determines that the operator is diligently pursuing all means to qualify such ship, the Maritime Subsidy Board shall defer termination to this authorization as to such ship; and provided further that, in the event that the operator fails to contract for new vessels, as specified in Article I-9 of Contract No. MA/MSB-115, to replace the vessels listed below, this authorization shall thereupon terminate.

Name of Vessel	Official Number	Date Built	Period during which subsidy must be paid
John Penn	270296	1955	Until subsidy no longer accrues under the provisions of Operating-Differential Subsidy Agreement, Contract No. MA/MSB-115, or is otherwise prohibited by this resolution.
George Walton	266534	1954	

Date: November 21, 1978

SO ORDERED BY THE
MARITIME SUBSIDY BOARD/
MARITIME ADMINISTRATION

.....

JAMES S. DAWSON, JR.
Secretary

SCHEDULE A

WATERMAN STEAMSHIP CORPORATION

C7-S-133a

RO/RO

PROPOSED MANNING SCALE

Rating	Number
Master	1
Chief Mate	1
2nd Mate	1
3rd Mate	2
Radio Officer	1
Boatswain	1
Able Seaman	6
Ordinary Seaman	3
Chief Engineer	1
1st Asst. Engineer	1
2nd Asst. Engineer	1
3rd Asst. Engineer	2
3rd Asst. Engineer (Day)	1
Chief Electrician	1
Q.M.E.D.	4
Wiper	1
Steward/Baker	1
Chief Cook	1
Messman/Utilityman	3
Total	33*

* Plus USMMA midshipmen, on an if and when carried basis.

Note: Enumeration of the detailed crew complement does not preclude, in appropriate circumstances, the operator from requesting, and the Board from authorizing, substitutions within the detailed crew complement as shown above.

Contract No. MA/MSB-115
SCHEDULE A

WATERMAN STEAMSHIP CORPORATION

C4 MARINER TYPE VESSELS

MANNING SCALE

Rating	Number
Master	1
Chief Mate	1
2d Mate	1
3d Mate	2
Radio Officer	1
Boatswain	1
A.B. Maint.	1
Able Seamen	6
Ordinary Seamen	3
Chief Engineer	1
1st Asst. Engineer	1
2d Asst. Engineer	1
3d Asst. Engineer	5
Chief Electrician	1
2d Electrician	1
Reefer Engineer[1]	1
Oilers	3
F.W.T.	3
Wipers	2
Chief Steward	1
Chief Cook	1
3d Cook	1
Night Cook & Baker	1
Mess./Util.	5
Total	44/45[1] *

[1] Reefer Engineer approved only when Cargo Reefer capacity is utilized.

* Plus USMMA Cadets on an if-and-when-carried basis.

Contract No. MA/MSB-450
APPENDIX A
Page 1 of 2

WATERMAN STEAMSHIP CORPORATION

SUBSIDIZED SERVICE

The description of the service required pursuant to this Agreement shall be as follows:

Trade Route No. 21 (U.S. Gulf/Western Europe Freight Service)

A minimum of 24[1] and a maximum of 35[1] sailings per annum between the areas described as follows:

Required

Between United States Gulf ports (Key West—Texas inclusive) and ports in the United Kingdom, Republic of Ireland and Continental Europe from the northern border of Portugal to but not including the southern border of Finland.

Privilege

Ports in Scandinavia (Norway, Sweden, Denmark, and Finland) and U.S.S.R. ports east of Finland in the Barents Sea.

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[1] The minimum/maximum shall be reduced to 16/24 when the second RO/RO Container type replacement vessel enters service.

NONSUBSIDIZED OPERATIONS

The description of the nonsubsidized operations specifically authorized for vessels covered by this Agreement, requiring no prior approval of the United States, shall be as follows:

> Between United States Atlantic ports (Portland, Maine, to Key West inclusive) and ports in the United Kingdom, Republic of Ireland, Continental Europe north of Portugal, Baltic (Poland and U.S.S.R. in the Baltic Sea), Scandinavia (Norway, Sweden, Denmark and Finland) and U.S.S.R. east of Finland in the Barents Sea.

The operator may conduct such nonsubsidized operations as part of, and in conjunction with, the required subsidized service described and as separate round voyages independent of the required subsidized service. On subsidized voyages commencing and terminating in the U.S. Gulf and calling at the Atlantic Coast, the total time of such calls including port and sea time shall not be included in the calculation of subsidy, except for that time lost or consumed by the ship that is determined to be time that would have been lost or consumed even had there been no such Atlantic Coast calls. In addition steaming and port time required for calls at a foreign port for which there is no Trade Route No. 21 cargo activity shall not be included in the calculation of subsidy.

Contract No. MA/MSB-450
APPENDIX B

WATERMAN STEAMSHIP CORPORATION

Subsidized Service

The Operator shall maintain and operate on the subsidized berth service designated in Appendix A hereof the following vessels:

Vessel Type	Vessel Name	MA Hull Number	Official Number	Date Built	Years of Economic Loss
C4-S-1a	Thomas Jefferson	MA-31	266977	1954	25
C4-S-1a	Arthur Middleton	MA-22	264597	1953	25
C4-S-A4	Alex Stephens	MC-710	524489	1945	25[1]
C4-S-A4	Robert Toombs	MC-711	523346	1945	25[2]

[1] Vessel reconstructed February 1970 and statutory economic life extended for 10 years from that date.

[2] Vessel reconstructed November 1969 and statutory economic life extended for 10 years from that date.

The Operator may transfer or interchange (substitute) those C4 and LASH type vessels as named in Contract No. MA/MSB-115 (between the United States and the Operator) for operation on Trade Route No. 18 and those C4 and LASH type vessels as named or described as replacement vessels in Contract No. MA/MSB-378 (between the United States and the Operator) for operation on Trade Route Nos. 12 and 22 with those C4 and Ro/Ro container type vessels as named or described as replacement vessels in this Agreement for operation on Trade Route No. 21 at a common U.S. port upon completion of any round voyage without the prior approval of the United States; *provided* that the authorization to transfer and interchange (substitute) Ro/Ro container type vessels from this Agreement shall only be permitted if the minimum sailing requirements under this Agreement shall have been met in the preceding year on the subsidized service, except for reasons beyond the control of the Operator within the meaning of Article II-2 of the Agreement or because of lack of cargo.

Contract No. MA/MSB-450
APPENDIX C
Page 1 of 2

Item and Service	Vessel type	Percentage of Per Diem Amount of United States Cost Representing Excess Over Foreign Cost: Per Diem for approved voyage days in Fiscal Period 1979	Percentage of Per Diem Amount of United States Cost Representing Excess Over Foreign Cost: Percentage applicable to unpredictably timed items of expense for approved voyages terminating in Fiscal Period 1979
Employment costs of Officers and Crews including payments required by law to assure old-age pensions, unemployment benefits, or similar benefits and taxes or other Governmental assessments on crew payrolls			
Trade Route No. 21	C4-S-1a, f,h,p,t	$3,079	51%
	C4-S-A4	$2,697	50%
	C9-S-81d	$2,882	51%

Contract No. MA/MSB-450
APPENDIX C
Page 2 of 2

Item and Service	Vessel Type	Percentage of United States Cost Representing Excess Over Foreign Cost
Protection and Indemnity Insurance Premium Cost		
Trade Route No. 21	Cargo	45.60
Foreign Deductible Averages for Crew Claims		
Trade Route No. 21	Cargo	Per Schedule "A-1" hereof

SCHEDULE A-1
Page 1 of 2

WATERMAN STEAMSHIP CORPORATION

1976

CARGO VESSELS

TRADE ROUTE NO. 21

Determination of Foreign Deductible Averages for Crew Claims

Foreign Flag Competition	Germany	Netherlands	Norway
Competition Percentage	30.7	25.7	43.6

Foreign Deductible Averages for GERMANY:

1—Crew Claims for Illness as indicated below: $120.00 Each Port

"Claims for expenses relating to illness shall be limited to the excess of $120.00 any one port, but combined claims, which it is established have arisen out of the same illness and have necessitated expenditure at more than one port, shall in the aggregate be recoverable in excess of $120.00."

Foreign Deductible Averages for NETHERLANDS:

1—Crew Claims for Illness as indicated below: $89.00 Each Port

"Claims for expenses relating to illness shall be limited to the excess of $89.00 any one port, but combined claims, which it is established have arisen out of the same illness and have necessitated expenditure at more than one port, shall in the aggregate be recoverable in excess of $89.00."

SCHEDULE A-1
Page 2 of 2

Foreign Deductible Averages for NORWAY:

1—Crew Claims for Effects in case of shipwreck, or for Wages as indicated below: $55.00 Each Port

"The Association covers the insurer's liability under statutes or tariff agreements for:

a) Wages to the crew or their dependents in the event of shipwreck, death, illness or injury.

b) The payment of wages according to a) covers, in case of illness or injury, the wages which the insured is required to pay to the person concerned for the time after his signing off.

In case a sick or injured crew member is not signed off, the wages payable by the Association under a) are the wages which the insured is required to pay to the person concerned for the period during which he receives treatment ashore, however, not exceeding the amount to which such a person would have been entitled as wages had he been signed off when the shore treatment commenced."

2—All Other Crew Claims (Other than Wages and Effects) $184.00 Each Port

Contract No. MA/MSB-450
APPENDIX E
Page 1 of 3

WATERMAN STEAMSHIP CORPORATION

C4-S-A4 TYPE SHIPS

MANNING SCALE

Rating	Number
Master	1
Chief Mate	1
2nd Mate	1
3rd Mate	2
Radio Officer	1
Boatswain	1
A.B./Maintenance	1
Able Seaman	6
Ordinary Seaman	3
Chief Engineer	1
lst. Asst. Engineer	1
2nd Asst. Engineer	1
3rd Asst. Engineer	3
Chief Electrician	1
2nd Electrician	1
Oiler	3
F.W.T.	3
Wiper	2
Chief Steward	1
Chief Cook	1
Cook and Baker	1
Messman/Utilityman	4
Total	40*

* Plus USMMA Cadets on an if and when carried basis.

WATERMAN STEAMSHIP CORPORATION

C4 MARINER TYPE VESSELS

MANNING SCALE

Rating	Number
Master	1
Chief Mate	1
2d Mate	1
3d Mate	2
Radio Officer	1
Boatswain	1
A.B. Maint.	1
Able Seamen	6
Ordinary Seamen	3
Chief Engineer	1
1st Asst. Engineer	1
2d Asst. Engineer	1
3d Asst. Engineer	5
Chief Electrician	1
2d Electrician	1
Reefer Engineer[1]	1
Oilers	3
F.W.T.	3
Wipers	2
Chief Steward	1
Chief Cook	1
3d Cook	1
Night Cook & Baker	1
Mess./Util.	5
Total	44/45[1*]

[1] Reefer Engineer approved only when Cargo Reefer capacity is utilized.

[*] Plus USMMA Cadets on an if-and-when-carried basis.

WATERMAN STEAMSHIP CORPORATION

C7-S-133a

RO/RO

MANNING SCALE

Rating	Number
Master	1
Chief Mate	1
2nd Mate	1
3rd Mate	2
Radio Officer	1
Boatswain	1
Able Seaman	6
Ordinary Seaman	3
Chief Engineer	1
1st Asst. Engineer	1
2nd Asst. Engineer	1
3rd Asst. Engineer	2
3rd Asst. Engineer (Day)	1
Chief Electrician	1
Q.M.E.D.	4
Wiper	1
Steward/Baker	1
Chief Cook	1
Messman/Utilityman	3
Total	33*

* Plus USMMA midshipmen, on an if and when carried basis.

Note: Enumeration of the detailed crew complement does not preclude, in appropriate circumstances, the operator from requesting, and the Board from authorizing, substitutions within the detailed crew complement as shown above.

Contract No. MA/MSB-450
APPENDIX F

WATERMAN STEAMSHIP CORPORATION

Replacement Obligation

(a) The Operator shall not later than the effective date of this Agreement contract for the construction of two (2) Ro-Ro/Container type vessels for operation on the Trade Route No. 21 service detailed in APPENDIX A hereof, such new vessels to replace the four (4) C4 type ships listed in APPENDIX B hereof. Failure by the Operator to contract for the two replacement vessels by said effective date will result in termination of this Agreement; *provided* that the construction contract may be contingent upon the requisite foreign cost determination and awards of CDS and ODS becoming final within the meaning of Section 7 of Department of Commerce Organization Order 10-8, as amended (38 Fed. Reg. 19707, July 10, 1973).

(b) One C4 type ship shall be withdrawn from this Agreement upon entry into subsidized service of the first replacement vessel and the three remaining C4 type ships shall be withdrawn from his Agreement upon entry into subsidized service of the second replacement vessel.

(c) Notwithstanding the obligations set forth in Article I-9 and this APPENDIX F, the Operator may at any time apply to the Board to withdraw its vessels from subsidized service and to modify or terminate the Agreement upon the basis that it cannot maintain and operate its vessels in the essential service described in APPENDIX A with a reasonable profit upon its investment in such vessels. Any termination of the Agreement pursuant to this provision shall be effective upon completion of voyages in progress.

Contract No. MA/MSB-450
APPENDIX G

WATERMAN STEAMSHIP CORPORATION

Section 804 Waivers

Pursuant to the provisions of section 804(b) of the Act, the following waivers for foreign-flag operations of the Operator or related companies have been granted under special circumstances and for good cause shown, and shall expire, unless otherwise shown, upon termination of the Agreement:

1. Waiver granted by the Assistant Secretary on January 30, 1976, as modified on August 3, 1976 (Docket A-106), to permit Coordinated Caribbean Transport, Inc. (CCT), an affiliate of Waterman, to own, charter, and operate foreign-flag vessels between Miami and Panama and Eucador from February 2, 1976, until (a) the second of two tug-barge units which CCT will construct in accordance with its CDS application filed December 23, 1975, enters U.S.-flag service between Miami and Panama and Ecuador, and (b) one or both of said units enter(s) service between Miami and Panama and Ecuador, but in no event later than December 31, 1979, under the terms and conditions as set forth in the Assistant Secretary's actions dated January 30, 1976 and August 3, 1976.

2. Waiver granted by the Assistant Secretary on August 30, 1976, to allow CCT to own, charter or operate foreign-flag vessels between Miami and Central America from August 30, 1976, until the earlier of (a) CCT's second U.S.-flag ARTUBAR vessel entering service, or (b) one or both of said vessels entering service between Miami and Central America but no later than December 31, 1979, subject to the conditions contained in the Assistant Secretary's action of August 30, 1976.

Contract No. MA/MSB-450
APPENDIX H

WATERMAN STEAMSHIP CORPORATION

Section 805 Written Permissions

No written permissions currently in force.

Contract No. MA/MSB-450
APPENDIX I

WATERMAN STEAMSHIP CORPORATION

Pooling Agreements

On November , 1978, the Assistant Secretary of Commerce for Maritime Affairs reaffirmed the approval of Waterman's participation in Agreement No. 8682, United States Gulf/Japan Cotton Pool, which was previously approved, through Amendment 9, on March 18, 1975.

The reaffirmation of approval of Waterman's participation in the above Agreement shall be without prejudice to the right of the Maritime Administration to subsequently review said Agreement and, as a result of such review, to require Waterman to take such lawful action as the Maritime Administration may require to amend, modify, terminate or withdraw from said Agreement, and subject to the further understanding that copies of the final statement for each pool year or part of a year, as the case may be, setting forth the final statement of pool revenue, as well as copies of such other reports, if any, as the Federal Maritime Commission may require under section 15 of the Shipping Act, 1916, shall be forwarded to the Maritime Administration.

On November , 1978, the Maritime Subsidy Board reaffirmed the findings and determinations with respect to the Agreement named above.

Contract No. MA/MSB-378
APPENDIX B

WATERMAN STEAMSHIP CORPORATION

Subsidized Vessels

The Operator shall maintain and operate on the subsidized berth service designated in Appendix A(2) hereof the following vessels:

Vessel Type	Vessel Name	MA Hull Number	Official Number	Date Built	Years of Economic Life
C4-S-1a	John B. Waterman	2	264652	1952	25
C4-S-1a	John Tyler	16	264497	1952	25
C4-S-1p	Samuel Chase	7	266092	1953	25
C4-S-1h	Joseph Hewes	3	266060	1953	25
C4-S-1f	Thomas Lynch	34	269668	1953	25

The Operator may transfer or interchange (substitute) those C4 and LASH type vessels as named in Contract No. MA/MSB-115 (between the United States and the Operator) for operation on Trade Route No. 18 and those C4 and Ro/Ro container type vessels as named or described as replacement vessels in Contract No. MA/MSB-450 (between the United States and the Operator) for operation on Trade Route No. 21 with those C4 and LASH type vessels as named or described as replacement vessels in this Agreement for operation on Trade Routes Nos. 12 and 22 at a common U.S. port upon completion of any round voyage without the prior approval of the United States.

Contract No. MA/MSB-378
APPENDIX I

WATERMAN STEAMSHIP CORPORATION

Pooling Agreements

On November , 1978, the Assistant Secretary of Commerce for Maritime Affairs reaffirmed the approval of Waterman's participation in Agreement No. 8682, United States Gulf/Japan Cotton Pool, which was previously approved, through Amendment 9, on March 18, 1975.

The reaffirmation of approval of Waterman's participation in the above Agreement shall be without prejudice to the right of the Maritime Administration to subsequently review said Agreement and, as a result of such review, to require Waterman to take such lawful action as the Maritime Administration may require to amend, modify, terminate or withdraw from said Agreement, and subject to the further understanding that copies of the final statement for each pool year or part of a year, as the case may be, setting forth the final statement of pool revenue, as well as copies of such other reports, if any, as the Federal Maritime Commission may require under section 15 of the Shipping Act, 1916, shall be forwarded to the Maritime Administration.

On November , 1978, the Maritime Subsidy Board reaffirmed the findings and determinations with respect to the Agreement named above.

APPENDIX M

[Appendices hereto have not been reprinted.]

BEFORE THE

U.S. DEPARTMENT OF COMMERCE

MARITIME ADMINISTRATION

MARITIME SUBSIDY BOARD

WATERMAN STEAMSHIP CORPORATION;

Contract No. MA/MSB-450

Petition of Sea-Land Service, Inc.

for Reconsideration of Board

Action of November 21, 1978

Pursuant to Section 201.174 of the Maritime Administration/Maritime Subsidy Board Rules of Practice and Procedure, Sea-Land Service, Inc. ("Sea-Land") hereby petitions the Maritime Subsidy Board to reopen and reconsider its determination to approve an application of Waterman Steamship Corporation ("Waterman") for operating differential subsidy on Trade Route (TR) No. 21, with the privilege of providing unsubsidized operations on TR 5-7-8-9, 6 and 11, as set forth in the Board's letter of November 21, 1978 to Waterman.[1]

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[1] Sea-Land is cognizant of the fact that because this matter has never been docketed for a hearing before the Board, the Rules of Practice and Procedure may be construed as inapplicable. Sea-Land has cast this document in the form of a petition for reconsideration under Section 201.174 of the Rules of Practice and Procedure simply because if such rules do not apply, then Sea-Land has no other administrative remedy or procedure to pursue. However, a comparable petition was filed and entertained in administrative proceedings before the Board in connection with the application of American Export Lines which ultimately became the subject of the decision of the Court of Appeals for the D.C. Circuit in *Sea-Land Service, Inc.* v. *Connor*. *See* American Export Isbrandtsen Lines—Subsidy, Routes 5-7-8-9, 6 S.R.R. 449 (M.S.B. 1965).

I. Introduction and Background.

On August 17, 1973, Waterman filed an application for operating differential subsidy on TR 21. No action was taken with respect to this application until July 25, 1974, when it was noticed in the *Federal Register*[2] and docketed as No. S-421. On August 6, 1974, Sea-Land filed a petition for leave to intervene, and by Board order of September 24, 1974, the application was ordered for a hearing under Section 605(c) of the Merchant Marine Act, 1936.

On May 15, 1975, the Waterman TR 21 application was corrected and updated. As amended, the application sought a long term operating differential subsidy agreement providing for a minimum of 20 and a maximum of 35 sailings annually on TR 21, with up to 24 subsidized privilege calls annually at U.S. Atlantic ports on Trade Routes Nos. 5-7-8-9, 6 and 11. A copy of the Waterman TR 21 application as revised and corrected on May 15, 1975 is attached hereto as Appendix A.

Following hearings before an ALJ, and an initial decision, on September 5, 1978, the Board issued its Final Opinion and Order in MSB Docket No. S-421, and Docket No. S-455, a separate application for subsidy on the North Atlantic. In this decision, the Board found that U.S.-flag service on TR 5-7-8-9 is, and will be for the foreseeable future, adequate and that Section 605(c) was therefore a bar to the Waterman application on that route. Insofar as TR's 6 and 11 were concerned, the Board found that Waterman had failed to show that its proposed operations would further the purposes and policy of the Merchant Marine Act and that, therefore, Section 605(c) constituted a bar on those routes also. A copy of the Final Opinion and Order is attached hereto as Appendix B.

On September 19, 1978, Waterman filed a petition for expedited reconsideration of the Board's determination concerning privilege calls on TR's 6 and 11. On September 21, 1978, it filed a further petition for reconsideration of the Final Opinion and Order insofar as it concerned required service on TR's 5-7-8-9, 6 and 11. Sea-Land answered both petitions on October 20, 1978, and on November 16, 1978 the Board issued

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[2] 39 Fed. Reg. 27180 (July 25, 1974).

an Order Denying Reconsideration. In the Order, the Board reaffirmed its earlier determination that Section 605(c) barred Waterman's application for (1) required service on TR's 5-7-8-9, 6 and 11, and (2) privilege service on TR's and 11 in connection with the required TR 21 service. A copy of the November 16 Order is attached as Appendix C.

On September 18, 1978, the day before Waterman filed its first petition for reconsideration, and three days before its second petition, Waterman submitted to the Board a "revised" application for operating differential subsidy on TR 21, seeking in addition the "privilege of calling at Atlantic Coast ports of the United States, on a nonsubsidized deviation basis, to load and discharge cargo." The application proposed to make a minimum of 20 and a maximum of 35 sailings annually on TR 21, and further requested the privilege of transferring and interchanging vessels in this service with other vessels operated by Waterman under subsidy contracts in other trades. A copy of the Waterman September 18, 1978 application is attached hereto as Appendix D. The application was further amended by two letters dated November 14, 1978 addressed to the Assistant Administrator for Maritime Aids, and to the Secretary of the Maritime Subsidy Board, respectively. Copies of the letter amendments are attached hereto as Appendices E and F, respectively.

Notwithstanding the substantial differences between the old 1973 application and the new September 1978 application, and despite its earlier findings that U.S.-flag service on TR's 5-7-8-9 is presently adequate and that Waterman had not shown that its proposed service on TR's 6 and 11 would further the purposes and policy of the Act, the Board by its November 21, 1978 letter granted the new application and approved the entry into a contract with Waterman, without any public notice or hearing whatsoever. A copy of the November 21 letter is attached as Appendix G.

II. Errors Alleged.

For the sake of clarity, we point out that Sea-Land does not complain herein of the Board's action with respect to the

TR 21 aspects of the Waterman application, which were the subject of hearings before the Board in MSB Docket No. S-421. Rather, Sea-Land seeks reconsideration of the Board's action as contained in its November 21, 1978 letter only insofar as it authorizes Waterman to make unsubsidized calls on TR's 5-7-8-9, 6 and 11.

A. *Inconsistency With S-421 Findings.*

In its Final Opinion and Order in Docket No. S-421, the Board held, *inter alia,* that the Waterman application therein was barred by Section 605(c) insofar as it proposed operations on TR's 5-7-8-9, 6 and 11. As to the North Atlantic routes, the Board found that U.S.-flag service is, and is likely to remain, adequate. As to the South Atlantic, Waterman's proposed service, containing no separate itineraries for that port range, nor any commitment whatsoever to make any sailings there at all, was not likely to reduce any existing inadequacy of U.S.-flag service there.

Yet in the face of these determinations, not even one week following the Board's reaffirmation of the above findings in its denial of Waterman's petitions for reconsideration, the Board has done precisely that which it found to be barred in Docket S-421! It has entered into an operating-differential subsidy contract with Waterman which allows that company to operate subsidized vessels on TR 5-7-8-9, 6 and 11. The fact that in deviating its vessels from TR 21 to North Atlantic ports, Waterman may receive no subsidy for the extra steaming time, as well as time in port, in connection with these calls is absolutely without significance to the validity of this action under the S-421 decision. Wholly apart from the manifest insubstantiality of the resulting reduction in subsidy (by Sea-Land's calculation, on the order of 10 percent), such a reduction in no way diminishes or mitigates the competitive impact upon Sea-Land and other U.S.-flag operators of the extension, by reason of Contract MA/MSB-450, of Waterman's subsidized TR 21 service to the North and South Atlantic routes. Indeed, the Board has held on innumerable occasions that the amount of subsidy to be paid to the applicant is irrelevant under Section 605(c).

The purpose of Section 605(c) is, *inter alia,* to protect the interests of the operators of existing U.S.-flag services on the route in question to the extent of preventing the addition of further subsidized service when such U.S.-flag service is already adequate. The simple realities herein are these:

1. Existing U.S.-flag service on TR 5-7-8-9 is adequate.

2. The proposed Waterman operations on these routes would be additional service.

3. The Waterman vessels in question would be supported by operating-differential subsidy leaked from TR 21 to TR 5-7-8-9, 6 and 11, thus accomplishing indirectly what the Board not one week earlier held could not be done directly.

Insofar as Waterman's proposed operation on TR 11 is concerned, the lack of commitment to maintain any regular sailings or minimum service levels was also held in S-421 to bar the application under Section 605(c).

The primary impact on other U.S.-flag carriers from the approval of a subsidy application for additional service such as Waterman's herein lies in the resulting diversion of available cargoes from those carriers already serving the route, to the new service—the inevitable redistribution of the same cargoes among a greater number of carriers. Where, as here, U.S.-flag service on the route is already adequate, such existing services necessarily suffer. The approval of Waterman's Contract No. MA/MSB-450 will therefore impact Sea-Land and other U.S.-flag operators in the North Atlantic trades in precisely the same manner as would have the "subsidized" privilege service found to be barred under Section 605(c). The Board's action as reflected in its November 21, 1978 letter to Waterman is absolutely irreconcilable with the S-421 decision.

B. *Failure To Provide Notice And A Hearing.*

The September 18, 1978 application was not noticed in the *Federal Register,* nor were hearings held with respect to the application prior to the approval of Contract No. MA/MSB-

450. The service contemplated by the contract—authorizing calls at North Atlantic and South Atlantic ports—is clearly in addition to existing U.S.-flag service on those routes. Interested parties (including Sea-Land and others), therefore, were entitled to an opportunity to be heard under Section 605(c). The action of the Board in approving the contract without notice and without hearing has deprived them of that fundamental right.

While the September 18 application purports on its face to be a revision of the earlier application, filed some five years previous, the only hearings which were held with respect to the 1973 application were those in Docket No. S-421, which as noted previously resulted in a finding by the Board that the application was barred with respect to TR 5-7-8-9, 6 and 11. Thus, the S-421 hearings obviously cannot constitute the legal foundation under 605(c) for the approval of a subsidy contract authorizing Waterman to operate subsidized vessels on those routes.

Furthermore, the new application would allow Waterman to shift its vessels from its other subsidized services to the Gulf/North Atlantic service and vice versa. This could result in the deployment on TR 5-7-8-9, 6 and 11 of Waterman's three new LASH type vessels currently operated in its Persian Gulf service. Such a shift of modern highly competitive vessels to these routes would not have been possible under the 1973 application considered in Docket S-421. It certainly would have substantial competitive implications to other U.S.-flag operators in this service.

Under the above circumstances, it strains credulity to contend that the 1978 Waterman application is but an "amendment" to the 1973 application, or that the hearings in Docket S-421 constitute a valid legal foundation for the Board's approval of Contract No. MA/MSB-450. In that regard, the facts surrounding the Board's action herein are almost identical to those considered by the U.S. Court of Appeals for the D.C. Circuit in *Sea-Land Service, Inc. v. Connor.*[3] In that case, the Court concluded that a hearing should have been held with

[3] 418 F.2d 1142 (D.C. Cir. 1969).

respect to an "amended" application which differed substantially from the initial application:

> "The trial court found, and the Secretary urges, that either the notice and opportunity for hearing under the application of February 24, 1964, met the statutory requirement of the application of April 7, 1965, or the latter was merely an amendment to the former and therefore no notice was required. Two things militate against this position. First, 46 C.F.R. § 201.77 (1968) relative to amendments to applications for subsidy, permits [a]mendments . . . to . . . be allowed . . . in the discretion of the [Secretary] . . . *Provided,* That after a prehearing conference has been held *no amendment shall be allowed which would substantially broaden the issues, unless an opportunity is afforded all parties to answer such amended pleadings and to prepare for hearing upon the broadened issues.*' " [Emphasis the Court's][4]

The Court continued, concluding that due to the substantial differences between the second application and the first, the second application could not be considered a mere amendment to the earlier one.

Sea-Land's insistence on its right to hearing in this instance is clearly not a mere legal maneuver seeking to defeat the Waterman application on a procedural technicality. Sea-Land indeed has real and substantial interests at stake—interests which have nowhere been considered in a hearing. As in *Sea-Land* v. *Connor,* in the interim between the 1973 and 1978 Waterman applications, Sea-Land has taken the initial steps toward inauguration of a new unsubsidized U.S.-flag service which would serve the same routes covered by Contract No. MA/MSB-450.[5] In particular, Sea-Land has taken the initial steps to institute a round-the-world service with 12 new D-9 class containerships which would call, *inter alia,* Jacksonville, Florida and Elizabeth, New Jersey. The details of the Sea-Land RTW service were set forth in Sea-Land's response to discovery requests in MSB Docket No. S-619. A copy of that

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[4] 418 F.2d at 1147.

[5] *See* 418 F.2d at 1145.

document is attached hereto as Appendix H. In the same proceeding, United States Lines, Inc. has also presented evidence, now in the public record, indicating that it too has taken initial steps to commence an eastbound RTW service similar to that being inaugurated by Sea-Land. The U.S. Lines service will be provided with 12 new vessels having a capacity in excess of 3,000 TEU's each. These new unsubsidized U.S.-flag services will add very substantial new capacity on the heavy leg of these trades. Their significance under Section 605(c) is clear, and interested parties are entitled to have them considered by the Board in a proper hearing before any action such as the award of Contract MA/MSB-450 is taken.

Because no hearing has been held herein, however, Sea-Land has been deprived of the opportunity to set out for the Board the details of its new service on these routes, or to develop other related facts on the record, such as for example that the authorization of service on the North and South Atlantic with no minimum service commitment as provided in Contract MA/MSB-450 will encourage and invite Waterman to skim the high rated cargoes, as well as military cargoes on TR 5-7-8-9 and 11, leaving only the less desirable cargoes for the new unsubsidized Sea-Land operation. As the D.C. Circuit has held:

> "[S]ince Congress has delegated the authority to the Secretary to pass upon applications for contracts of government subsidy, and since these grants are a part of the government wealth, it is incumbent upon the Secretary to follow sound administrative procedures to determine the necessity of expenditures and thereby serve the master, public interest. Every dollar paid to these carriers amounts to a deficit upon the books of the Secretary and the public audit requires him to justify or balance these expenditures with proper administrative proceedings. . . ."[6]

As in this case, the failure of the Board to hold hearings on the new "revised" Waterman application has prevented a proper balancing herein.

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[6] 418 F.2d at 1149.

C. *"Unsubsidized" Service on TR 5-7-8-9, 11.*

In allowing Waterman to operate subsidized vessels on TR 5-7-8-9, 6 and 11 by the expedient of subtracting from the overall round voyage, the steaming time and port time consumed in connection with the calls on those routes, the Board has sanctioned subsidized competition to the existing U.S.-flag operators providing service there. Insofar as we are aware, this action by the Board is novel and without precedent. It results in wholesale leakage of subsidy from a subsidized service on TR 21 to the North and South Atlantic routes, where subsidy is barred by Section 605(c). Despite the resultant small reduction in subsidy,[7] it is undeniable that the grant of subsidy by the Board to Waterman has furnished to Waterman the wherewithal to serve these trades. Indeed, Waterman has made it clear that it would not serve them except as an adjunct of subsidized service on TR 21. Thus, in every realistic sense, subsidy is in fact being paid for the operation of these vessels in the North Atlantic routes. This, we submit, is improper and erroneous.

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[7] According to our calculations, the total reduction in subsidy payable under the contract by reason of calls on the North Atlantic would be about 10 percent.

IV. Conclusion.

For the reasons stated above, Sea-Land requests that the Board reconsider its determination contained in its letter of November 21, 1978 to grant to Waterman Steamship Corporation an operating differential subsidy contract on TR 21 which includes the privilege of providing unsubsidized operations on TR's 5-7-8-9, 6 and 11. Sea-Land further requests that the matter be ordered for a hearing under Section 605(c) of the Merchant Marine Act, 1936.

Respectfully submitted,

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December 11, 1978

CERTIFICATE OF SERVICE

I hereby certify that I have this 11th day of December, 1978 caused a copy of the foregoing document to be served on Waterman Steamship Corporation by first class mail, postage prepaid.

.....

Gary R. Edwards

No. 83-1898

In the Supreme Court of the United States

OCTOBER TERM, 1984

SEA-LAND SERVICE, INC., PETITIONER

v.

ELIZABETH HANFORD DOLE,
SECRETARY OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether Section 605(c) of the Merchant Marine Act of 1936, 46 U.S.C. (Supp. V) 1175(c), requires the Maritime Subsidy Board, after executing an operating-differential subsidy contract following a hearing, to hold a second hearing before authorizing the subsidized vessels to call on certain ports off the subsidized route.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 723 F.2d 975. The opinion of the district court (Pet. App. 1g-9g) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 23, 1983 (Pet. App. 1h-2h). The Chief Justice extended the time for filing a petition for a writ of certiorari to and including May 21, 1984, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 605(c) of the Merchant Marine Act of 1936, 46 U.S.C. 1175(c), is set forth in full at Pet. App. 2i. (Section 605(c) was amended in 1981 to substitute the Secretary of

Transportation for the Secretary of Commerce. Pub. L. No. 97-31, § 12, 95 Stat. 162.)

STATEMENT

1. The Merchant Marine Act of 1936 was enacted to foster an efficient, American owned and operated merchant fleet able to carry a substantial portion of American export and import trade, and able to serve as a naval auxiliary in time of war. 46 U.S.C. 1101. To these ends, the Act provides for a variety of subsidy programs designed to enable American ship owners to achieve parity with foreign ship owners with respect to such matters as operating expenses and construction costs. See *Moore-McCormack Lines, Inc.* v. *United States,* 413 F.2d 568, 571 (Ct. Cl. 1969).

Section 605(c) of the Act, 46 U.S.C. (Supp. V) 1175(c), the provision at issue in this case, is part of subchapter VI, entitled "Operating-Differential Subsidy" (ODS). In granting an ODS, the government contracts to subsidize operations of American flag vessels in return for a commitment on the part of the ship owner (a) to keep the subsidized ships under United States registry for a specified period, (b) to maintain operations on specified routes, and (c) to employ United States citizens. See *Oceanic S.S. Co.* v. *United States,* 586 F.2d 774, 777 (Ct. Cl. 1978). An applicant seeking an ODS must meet the eligibility requirements of Section 605. In addition, Section 605(c) provides in pertinent part:

> No contract shall be made under this subchapter with respect to a vessel to be operated in an essential service served by citizens of the United States which would be in addition to the existing service, or services, unless the Secretary of Transportation shall determine after proper hearing of all parties that the service already provided by vessels of United States registry is inadequate, and that in the accomplishment of the

purposes and policy of this chapter additional vessels should be operated thereon.

The "contract" referred to in Section 605(c) is for the payment of an ODS to an applicant. 46 U.S.C. (Supp. V) 1173(a).

2. In 1973, Waterman Steamship Corporation filed an application that, as amended, sought an ODS on a specified trade route (Trade Route 21) with the privilege of calling on six other specified routes (Pet. App. 1b). In 1975, Waterman filed a separate application for an ODS on these other six trade routes (*ibid.*). Following public notice of these applications, submission of comments in opposition by competing shipping companies including petitioner, and public hearings, an administrative law judge (ALJ) made a Section 605(c) finding that United States flag service on all the requested routes was inadequate and that subsidies would serve the purpose of the Act (Pet. App. 1b-60b). The Maritime Subsidy Board (Board) affirmed the ALJ's finding concerning Trade Route 21, but found that Section 605(c) barred subsidized service on the six other routes (Pet. App. 1c-27c).

Waterman then submitted a revised ODS application which conformed to the Board's final decision by requesting an ODS for Trade Route 21, along with the privilege of making nonsubsidized calls along the six other routes. Noting the Section 605(c) determinations made in its previous decision, the Board then issued a letter approving Waterman's revised application without holding a separate hearing (Pet. App. 1*l*-41*l*). The Board and Waterman entered into an ODS contract in accordance with the terms of the letter (Pet. App. 5a).

Petitioner requested the Board to reconsider the determination embodied in its letter (Pet. App. 1m-10m). Petitioner contended, inter alia, that the Board erred in not

holding a second Section 605(c) hearing before approving the nonsubsidized service (Pet. App. 5m-8m). The Board denied petitioner's request (Pet. App. 1e-4e), and the Secretary of Commerce denied review (Pet. App. 1f).

3. Petitioner then filed this action in the United States District Court for the District of Columbia alleging, inter alia, that it was denied its statutory right to a hearing under Section 605(c) when the Maritime Subsidy Board allowed Waterman to conduct nonsubsidized operations over the six trade routes for which a subsidy had been denied following the initial Section 605(c) hearing. The district court granted summary judgment in favor of the respondents (Pet. App. 1g-11g). Noting that Section 605(c) refers to contracts made "under this subchapter," and that the subchapter is entitled "Operating-Differential Subsidy," the court concluded that the Section 605(c) hearing requirement applies only to subsidized operations (Pet. App. 6g).

The court of appeals affirmed (Pet. App. 1a-9a). The court noted at the outset that its task was "not to provide [its] own original construction of the governing statute, but rather to determine whether the agency's construction is 'sufficiently reasonable' to be allowed" (*id.* at 7a, citing *FEC* v. *Democratic Senatorial Campaign Committee,* 454 U.S. 27, 39 (1981); *Train* v. *Natural Resources Defense Council, Inc.,* 421 U.S. 60, 70 (1975)). The court concluded that the Board's position that a separate hearing is not required before the Board may approve nonsubsidized traffic is consistent with the language of Section 605(c), with the statute's underlying policy to avoid subsidizing adequately served routes, and with the Board's prior decisions (Pet. App. 7a-9a).

ARGUMENT

The decision of the court of appeals is correct and, this being a case of first impression, does not conflict with the

decision of any other court. Accordingly, further review is not warranted.

Petitioner contends (Pet. 9-21) that the court of appeals erred in upholding the Maritime Subsidy Board's interpretation of Section 605 as "sufficiently reasonable." Petitioner, however, ignores the fact that the court of appeals reached its conclusion only after determining that the Board's interpretation was consistent with the statutory language and purpose.

It is well settled that when faced with a problem of statutory construction, a reviewing court must ordinarily accord great deference to the interpretation of the statute by the agency charged with its implementation. See, *e.g.*, *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). As this Court recently explained in *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, No. 82-1005 (June 25, 1984), slip op. 4-5 (footnotes omitted):

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

This Court has recognized that the Secretary has substantial discretion in administering the ODS program. *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U.S. 572, 586 (1980). In its decision below, the court of appeals, after examining the language and purpose of the statute, properly upheld the reasonable administrative construction of Section 605(c). That construction is consistent with, if not compelled by, the statutory language. The introductory clause of Section 605(c) states: "No contract shall be made under this subchapter with respect to a vessel to be operated in an essential service [without proper hearing]." 46 U.S.C. (Supp. V) 1175(c). As the district court recognized (Pet. App. 6g), the phrase "under this subchapter" plainly refers to contracts for subsidized routes because Section 605(c) is found in subchapter VI, entitled "Operating-Differential Subsidy." Contracts for an ODS subsidize shipping operations over certain specified trade routes deemed to be "an essential service." 46 U.S.C. (Supp. V) 1173(a), 1175(c). It follows from the language of Section 605(c) that the statutory hearing requirement applies only with respect to those subsidized shipping operations.

Petitioner argues (Pet. 17-20) that the Maritime Administration's General Order 80, 46 C.F.R. 281.11 (reprinted at Pet. App. 1j-7j), is evidence that the agency has interpreted Section 605(c) to apply to nonsubsidized operations. The court of appeals correctly rejected this contention (Pet. App. 8a). By its terms, General Order 80 "do[es] not apply to * * * [n]on-subsidized voyages specifically authorized by the operation-differential subsidy contract of the operator." 46 C.F.R. 281.11(b) (Pet. App. 1j). If such operations are not so authorized, the subsidized operator must apply to the Maritime Administrator for approval. 46 C.F.R. 281.11(a), 281.12(a) (Pet. App. 1j, 3j-4j). The Administrator, in his discretion, may hold an informal hearing regarding the proposal to allow additional nonsubsidized service. 46 C.F.R. 281.13(a) (Pet. App. 4j-5j). However, "[t]he hearing

is not only optional but is stated to be 'for advisory purposes only' " (Pet. App. 8a). General Order 80 therefore establishes a framework for the Administrator to consider a request regarding nonsubsidized operations when such consideration has not already taken place in the context of an individual ODS contract. As the court of appeals concluded (Pet. App. 8a), the inclusion of a discretionary hearing provision in this regulatory scheme undercuts, rather than supports, petitioner's argument. Indeed, if the Maritime Administration had interpreted Section 605(c) to apply to nonsubsidized operations and to *require* a hearing, there would have been no need to promulgate General Order 80, which permits nonsubsidized operations to be approved without any hearing at all.

Contrary to petitioner's contention (Pet. 28), the purpose of Section 605(c) is not to prevent overtonnaging on both subsidized and nonsubsidized routes. In *Sea-Land Service, Inc.* v. *Kreps*, 566 F.2d 763, 774 (D.C. Cir. 1977) (emphasis added; footnote ommitted), the court of appeals recognized that "[S]ection 605(c) is primarily designed to avoid *subsidizing* a trade when the trade is already adequately served by U.S.-flag carriers, *i.e.*, overtonnaging." Congress intended Section 605(c) as a protective device to insure proper use of public funds. The danger of overtonnaging is therefore relevant under Section 605(c) only insofar as the Board is considering the possible expenditure of public funds in the form of an ODS.

The fundamental error of petitioner's broad interpretation of Section 605(c) is made manifest by examining its practical consequences. The immediate goal of a Section 605(c) hearing is to enable the Board to make the "inadequacy" and "purposes and policy" determinations mandated by the statute. These determinations provide, in turn, the basis for the Board's decision whether an ODS award is barred. Where, as here, subsidization of Waterman's operations on the six other trade routes had previously been the

subject of a hearing and had been denied, holding a second hearing at which a subsidy would not be an issue would be an exercise in futility given the purpose of the statute.[1]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Attorney

AUGUST 1984

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[1]In any event, as the court of appeals concluded (Pet. App. 7a-8a; emphasis in original), even assuming, as petitioner contends,

> that the purpose of the statutory scheme is not merely to prevent subsidies from *causing* overtonnaging of essential service routes, but also to use subsidies to *prevent* overtonnaging of such routes (by prohibiting unneeded service by vessels subsidized for other routes) * * *, it is still reasonable to believe that the former policy, being the stronger and more explicit, was meant to be implemented through mandatory public hearings under § 605(c), whereas the latter was left to be implemented through discretionary hearings and more informal means. The position that the hearing requirement does not apply to nonsubsidized operations is supported by the fact those operations go unaddressed in all the other provisions of this subchapter.